IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1444

JAMES CARBONE,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Petitioner James Carbone prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Connecticut announced January 18, 1977.

Opinions Below

The opinions of the Supreme Court of Connecticut, reproduced in the appendix to this petition (28a, 51a),[1] are reported at Vols. XXXVI, No. 37 CONN. L.J. 5 (1975) and XXXVIII, No. 29 CONN. L.J. 8 (1977).

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[1] References to the numbered pages of the appendix to this petition are indicated (a).

Jurisdiction

The Judgment of the Supreme Court of Connecticut was entered on January 18, 1977. A timely motion for reargument was denied on February 3, 1977, the effective date of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

This case involves a conviction for four separate alleged violations of larceny and raises these questions:

1. Does the conviction of petitioner on an information which is duplicitous in that each of the four counts disjunctively charges petitioner with the mutually exclusive offenses of theft and of receiving stolen goods, violate petitioner's right to be informed of the nature and cause of the accusation against him and deny him due process of law as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Did petitioner freely and voluntarily waive his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States during a search by a large search party of civilians and police pursuant to a hopelessly stale warrant which did not authorize a search for the item seized?

3. Was petitioner's Sixth Amendment right to confront the witnesses against him erroneously sacrificed in deference to the Fifth Amendment privilege against self-incrimination when the trial court barred petitioner's attempt to

show the bias and interest of the State's principal witnesses through cross-examination of them concerning their invocation of the privilege in prior civil proceedings?

Constitutional and Statutory Provisions Involved[1]

U.S. Constitution, Amend. IV, V, VI and XIV.

§53-63a Conn. Gen. Stat. (1958 Rev.).
§53-65 Conn. Gen. Stat. (1958 Rev.)

Statement

The Facts Material to the Federal Questions

Petitioner James Carbone, and his brother Peter Carbone[2] were tried and convicted upon substituted informations charging each of them with four counts of larceny committed on distinct dates in January and February, 1971 (28a, 51a).

In May of 1971, management at the Carpenter Technology Corporation became aware of a large inventory shortage in metals used at its plant in Bridgeport, Connecticut. On July 14, 1971, Albert Edwards and Russell Scofield, both employees of Carpenter, were apprehended while stealing pure nickel from the Carpenter plant (44a).

A short time after their arrests, both Edwards and Scofield began "cooperating" with the Bridgeport police and with persons connected with Carpenter and its insurance carrier. In early August, 1971, each of the thieves

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[1] Reproduced in the appendix (77-79a).

[2] The Court below erroneously refers to Peter Carbone as James' son (31a, 53a).

gave statements to Detective Cafferty of the Bridgeport Police Department claiming that on four different dates in January and February of 1971, they had stolen from Carpenter quantities of nickel, iron and copper and had sold and delivered the metals to petitioner and his brother at Fairfield Scrap Iron and Metal Company owned by petitioner. The State's case rested almost entirely on the testimony of the two thieves. One of the items offered in evidence, however, which the State claimed corroborated their testimony was a phony receipt slip which Scofield claimed he had signed in an assumed name, "John Parks," when making a delivery to Fairfield Scrap (29a, 52a).

On September 2, 1971, approximately seven month after the alleged thefts, Detective Cafferty and Robert Magee, an employee of Carpenter, obtained a state search and seizure warrant authorizing a search of Fairfield Scrap for the alleged stolen metals and two chains and a tarpaulin used in handling the metals, none of which items were found on the premises (7a, 32a, 54a). No authority to search for or seize books and records was sought or obtained.

Detectives Cafferty and Magee then returned to Carpenter where they began to amass a large search party. In addition to Magee, Henry Popowski, Foreman of the Melt Shop at Carpenter was invited to help identify questioned items. Alfred Constantino, a special investigator for Carpenter's insurance carrier was brought along for no apparent reason. Another Bridgeport policeman, two Fairfield officers and an F.B.I. agent rounded out the party. It was that formidable group which descended en masse, in four vehicles, on Fairfield Scrap about 2:00 P.M. on September 2, 1971 (30a, 52a-54a).

All of the persons in the search party, both police officers and civilians were dressed in civilian clothes (30a, 53a). When the search party arrived at Fairfield Scrap, Sargeant Targowski, the senior Fairfield Police Officer, sought out petitioner or Peter Carbone, but petitioner was not present (31a, 53a). Targowski displayed the warrant to Peter Carbone and advised him of his purpose on the premises (31a-53a). All eight of the search party, including the civilians, fanned out around the premises for purposes of the search (32a, 54a). The officers in charge, Cafferty and Targowski, were both aware of the fact that the warrant did not authorize a search for any books and papers of Fairfield Scrap (33a, 55a). On the way to the premises before the search, Detective Cafferty had a conversation with the insurance investigator, Constantino, concerning a search for slips and records with the thieves' names on them, and Cafferty told him not to search for anything, but if they happen to see anything with those names on it, to let him know (30a, 53a).

Shortly after the search began, petitioner arrived, as did his son and employee, Frank Carbone. After the search party had been on the premises for an hour or so, Constantino asked Frank, in petitioner's presence, if it would be alright to search through their sales receipts (32a, 54a). Before that time Detective Cafferty had given both petitioner and Peter Carbone their "Miranda" warnings, but at no time did he warn them that they need not allow any search for items not named in the warrant, nor did he specifically tell anyone just what was in the warrant (31a-33a, 54a-55a). Petitioner never took the warrant and read it, and there was no indication that anyone read any portion of the warrant to him (31a, 53a). Although

Detective Cafferty took no part in the Constantino-Carbone conversation, he was present and within earshot when the request was made of Frank Carbone (32a, 54a). Detective Cafferty remained silent even though he knew a very possible result of Constantino's question was that a search would take place; Detective Cafferty did not tell any of the Carbones who Constantino was prior to the request for sales receipts and records (32a, 54a).

Frank Carbone got the receipts in response to Constantino's request; the two civilians, Constantino and Popowski, looked through them, and Popowski found the "John Parks" slip (32a-33a, 54a). Petitioner made no objection to Frank getting the sales receipts (32a, 54a). Prior to that search, neither Popowski nor Constantino had had any conversation with the Carbones nor had they informed them that they were civilians and not any "official" part of the search party. Neither Constantino nor Popowski had ever asked any permission to come on the premises (32a, 54a). The Carbones were not asked to sign a consent to search form, although the Bridgeport police have such forms, nor were they ever advised by anyone that the seizure of the slip was beyond the scope of the warrant (33a, 55a). When they left three and a half hours later, the search party had found nothing named in the warrant, but had taken the "John Parks" receipt which was later admitted at trial (34a).

Petitioner and co-defendant Peter Carbone each maintained his innocence and both testified to that effect at the trial, which involved deeply disputed issues of fact. As noted by the court below, the State's case "hinged in the main part upon the credibility of the witnesses Scofield and Edwards" (34a).

During the trial, a number of significant evidentiary issues arose. During the cross-examination of the two principal State's witnesses, Albert Edwards and Russell Scofield, petitioner and the co-defendant sought to show that each of them had, in earlier depositions in a civil action arising out of the same alleged facts, pleaded a Fifth Amendment privilege to avoid giving any information or testimony to the defendants in the criminal action (10a). Both Scofield and Edwards, long prior to the time of those depositions, had given to the police lengthy sworn statements which had hopelessly incriminated them (10a-11a). Scofield, in fact, had already pleaded guilty and was waiting sentence on charges arising out of the subject matter of his proposed deposition testimony (11a). The testimony was offered on the issue of the credibility of the two thieves, to show interest in the prosecution and bias against the defendants (12a). The trial court sustained the prosecution objection to such offers, and both defendants excepted (12a).

The jury returned a verdict of "guilty as charged" on each of the four counts (29a) and petitioner was sentenced to a term of incarceration of not less than three years and not more than nine years in the State's prison.

The Manner of Raising the Federal Questions

Petitioner was charged in a substituted information with four separate counts of larceny in violation of §53-63a of the Connecticut General Statutes (1958 Rev.)[4] (8a). In his Motion for a Bill of Particulars he asked the State to specify, *inter alia*, whether he was charged as a principal thief or as a receiver of stolen goods under §53-65,

[4] Repealed October 1, 1971.

not specifically cited in the information, which motion was denied (8a).

At the end of the State's case, petitioner moved to dismiss the information on the ground that each count was defective as duplicitous in that each count charged two separate crimes, which motion was denied (12a). Also, at the end of the State's case, petitioner filed a motion to require the State to elect a single theory of guilt with respect to each count: either as a principal or accessory to the thefts or as a receiver of stolen goods, which motion was denied (13a).

Finally, petitioner requested the trial judge to charge the jury on a theory of one or the other, claiming that it would be improper to put both theories to the jury on each count (14a). Nevertheless, the judge submitted the case to the jury with three theories of guilt on each count: theft, accessory to theft *or* receiving stolen property (15a-26a). In his charge, to which exception was taken (27a), the trial court stated:

> "You may find the defendant guilty of *either* larceny *or* the offense of receiving and concealing stolen goods, but not of both offenses as to any one count." (Emphasis added.) (15a).

As to petitioner's claim that he was entitled to know whether on each count he was being tried as a principal thief or as a receiver of stolen goods, the court below held that it was error to deny petitioner's request for a bill of particulars, but that it was harmless because

> "experienced counsel for James Carbone was aware that §53-63a was violated either by larceny *or* by receipt of stolen property; otherwise he would not have asked the prosecution to elect between the two theories. He undoubtedly understood the State's refusal to elect as an implicit statement that it was charging *both* and would endeavor to prove *either*." (Emphasis added.) (66a).

The Fourth Amendment issues regarding the search and seizure were raised by petitioner's motion to suppress and for return of property which was denied in the trial court (9a). On the first appeal in this proceeding, the Supreme Court of Connecticut reversed on the search issue holding, *inter alia*, that "[t]here clearly was merit to the claim that the warrant was stale" and that the illegality of entry due to the staleness of the warrant was a factor to be considered on the question of voluntariness (40a).

On remand, the trial court again denied the motion to suppress and the former judgment of conviction was reinstated without a new trial (51a). On the second appeal, the Supreme Court of Connecticut upheld the search as consensual, and reached the other issues which it had not decided on the first appeal (60a).

With respect to petitioner's Sixth Amendment right to cross-examine the State's witnesses about their prior invocation of their Fifth Amendment privilege against self-incrimination, the court below held that "[t]he prior invocation of a constitutional privilege can be motivated by so many factors other than bias that the court was within its discretion in excluding cross-examination on this matter as irrelevant" (68a).

Reasons for Granting the Writ

Review of the decision below by this Court is called for (1) because this Court has never proclaimed that a conviction on a duplicitous count cannot withstand constitutional scrutiny and the ruling of the court below stands in blatant defiance of this Court's pronouncements regarding fundamental fairness and an accused's right to know the nature of the accusation against him; (2) because the court below failed to apply the established principles of this Court in ruling on the staleness of the warrant and the voluntariness of the consent to search; and clarification of the constitutional safeguards is called for in light of recent developments in the law of search and seizure; and (3) because this Court has not previously determined whether an accused's Sixth Amendment right to cross-examine the witnesses against him must give way to a prosecution witness' Fifth Amendment privilege against self-incrimination, and this issue—significant to our adversary procedure—was decided by the court below in contravention of the applicable principles set forth by this Court.

I.

To this very day, neither petitioner nor anyone else, except perhaps the jury, knows whether the verdict of "guilty as charged" (29a) convicted him of the crime of theft or of the crime of receiving stolen property. Nor does anyone know whether petitioner was adjudged a thief with respect to some counts and a receiver of stolen property with respect to other counts, a thief on all counts or a receiver on all counts. See *Bins* v. *United States,* 331 F.2d 390, 393 (5 Cir. 1964).

Whereas review of criminal convictions in the past few decades has largely been concerned with the refinement of legal concepts defining the parameters of individual liberties under the Bill of Rights, petitioner asks this Court to reaffirm one of the most elementary principles of criminal justice—his right "to be informed of the nature and cause of the accusation" against him, as guaranteed by the Sixth Amendment.

Petitioner's request for *certiorari* is based on reasons similar to those which gave rise to the landmark case of *Thompson* v. *Louisville,* 362 U.S. 199 (1960), in which this Court reversed a police court conviction with a reaffirmation of the basic principle that it is a violation of due process to convict a man without evidence of his guilt. Petitioner seeks review of the decision of the court below —which conveniently categorized the fundamental flaw of duplicity in the charge as harmless error—in order to reaffirm the fundamental principle that it is a violation of due process and the Sixth Amendment to convict a man without ever telling him the offense with which he is charged and upon which he stands convicted.

As the court below noted, under Connecticut's larceny statute §53-63a, one can be charged either as a principal in the theft or as a receiver of stolen property under an accessory statute, §53-65. But, as the Supreme Court of Connecticut recently held, "the essential elements of receiving stolen goods are materially different from those of the crime of theft." *State* v. *Huot,* 170 Conn. 463, 468 (1976).[5] Receiving stolen property, moreover, is not a

[5] "The essential elements of the crime of receiving stolen goods are: (1) The property must have been stolen. (2) It must

lesser included offense within larceny. *Id.* The two offenses, theft and receiving stolen property under Connecticut law are mutually exclusive in that one cannot be both a principal thief and a receiver of the same goods. *State* v. *Palkimas,* 153 Conn. 555, 561 (1966). Yet, petitioner, as noted, was charged with both offenses in each count and the jury was told that he could be convicted of one or the other under each count (15a).

Duplicity, the joining in a single count of two or more distinct and separate offenses, 1 C. Wright FEDERAL PRACTICE AND PROCEDURE §142 at 306 (1969), has several inherent vices, of which the most obvious is the violation of the basic principle that the accused must be apprised by the indictment or information with reasonable certainty of the nature of the accusation against him. *Russell* v. *United States,* 369 U.S. 749, 766 (1962).

As this Court observed long ago:

> "It may be conceded that an indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or another of several offenses, would be destitute of the necessary certainty, and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offense charged, and thus enable

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have been received by the accused with the knowledge that it was stolen. (3) It must have been concealed within the meaning of the law. (4) It must have been received and concealed by the accused with a felonious intent. . . . The elements of larceny, on the other hand, are: '(1) the wrongful taking or carrying away of the personal property of another; (2) the existence of a felonious intent in the taker to deprive the owner of it permanently; and (3) the lack of the consent of the owner.'" *State* v. *Huot, supra,* 170 Conn. at 467-468.

> him to defend himself, and neither a conviction nor an acquittal could be pleaded in bar to a subsequent prosecution." *The Confiscation Cases,* 87 U.S. (20 Wall.) 92, 104 (1873).

More recently this Court has decreed the test for determining the sufficiency of the charging document to be whether it contains the elements of the offense intended to be charged; whether it sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Hagner* v. *United States,* 285 U.S. 427, 431 (1932); *Russell* v. *United States, supra,* 369 U.S. at 763.

Furthermore, prosecution of petitioner on the same count for two mutually exclusive offenses with materially different elements renders it impossible for any court to determine whether petitioner was afforded the requisite protection of the Due Process Clause "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

What the court said of "the uncertainty and unfairness" of the indictment in *Russell* seems equally applicable to the duplicitous information here in that it

> "requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Russell* v. *United States, supra,* 369 U.S. at 766.

Reversing a conviction founded on a duplicitous indictment under the Hobbs Act,[6] the Third Circuit recently explained the vices inherent in duplicity:

> ". . . One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him not guilty of one crime or not guilty of both. Conceivably this could prejudice the defendant in protecting himself against double jeopardy. Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or of both. Conceivably, this could prejudice the defendant in sentencing and in obtaining appellate review. A third vice of duplicity is that it may prejudice the defandant with respect to evidentiary rulings during the trial, since evidence admissible on one offense might be inadmissible on the other. . . . Finally, there is no way of knowing with a general verdict on two separate offenses joined in a single count whether the jury was unanimous with respect to either." *United States* v. *Starks, et al.*, 515 F.2d 112, 116-117 (5 Cir. 1975).[7]

In *Starks,* prejudicial error was found even though the trial court had conscientiously sought to charge the jury so as to eliminate the problems associated with the duplicitous indictment, by instructing the jury that in order to find any defendant guilty, it must find that the essential elements of *both* offenses had been proved. In the pending

[6] 18 U.S.C. §1951, which proscribes a number of separate offenses as does the Connecticut larceny statute under which petitioner was charged.

[7] On remand, the defendants in the *Starks* case, moved to dismiss on the ground that the Fifth Amendment's double jeopardy clause bars retrial of defendants convicted by a jury whose general verdict of guilty on the duplicitous indictment failed to disclose whether the jury found each defendant guilty of one crime or both. On that issue, this Court has granted *certiorari sub nom. Abney, et al.* v. *United States,* —— U.S. ——, 44 U.S.L.W. 3719 (June 14, 1976) (No. 75-6521).

case, where the trial judge gave instructions reinforcing the disjunctive and, therefore, duplicitous counts, *a fortiori* the error is prejudicial.

Duplicity need not be fatal, however, and lower federal courts have found that the harm caused by duplicity can be cured by a motion to dismiss or by requiring the prosecution to make an election prior to the submission of the case to the jury. *United States* v. *Hicks,* 529 F.2d 841, 843 (5 Cir. 1976); *Bins* v. *United States,* 331 F.2d 390, 393 (5 Cir. 1964); *United States* v. *Goodman,* 285 F.2d 378, 380 (5 Cir. 1960); *United States* v. *Droms,* —— F.2d ——, *slip op.* 2035 (2 Cir. Feb. 25, 1977), No. 76-1232; *United States* v. *Bachman,* 164 F.Supp. 898 (D.C. 1958). Where an election is not made, the error is incurable and harmful *per se. United States* v. *Leggett,* 312 F.2d 566, 568 (4 Cir. 1962).

The conscientious and repeated efforts of petitioner's counsel to invoke such remedies not only were denied by the trial court but, indeed, were used by the court below to justify its rationale that the error was not prejudicial since counsel's attempts to cure this defective prosecution indicated his awareness that he should have been prepared to defend against both offenses on each count.

"[A] salutary development in the criminal law", *Russell* v. *United States, supra,* 369 U.S. at 763, is how this Court has characterized the trend that convictions are no longer reversed because of minor and technical deficiencies in the charging papers which do not prejudice the accused. "But," this Court has admonished, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Ibid.* To permit petitioner's conviction to stand on this duplicitous and fatally defective information would flout

the proclamation that "the basic principles of fundamental fairness retain their full vitality under modern concepts of pleading." *Id.* at 765-766.

II.

> "There clearly was merit to the claim that the warrant was stale and the court erred in failing to consider this circumstance in determining the issue of consent." (40a).

With that ruling in its original opinion, the court below found error in the denial of petitioner's motion to suppress and remanded the case to the trial court (42a). In support of its ruling on staleness, the court below had stated:

> "Thus the *unsupported observation* by Detective Cafferty that the items are 'reported to be on [sic] the current custody and care of the premises' is insufficient to establish continuity, and, thus, we are unable to find that there is a substantial basis for the issuing judge's conclusion that probable cause presently existed." (Emphasis added). (39a).

On remand, the same trial judge again upheld the search (50a). But, when the case came up on appeal the second time, the court below reviewing the very same affidavit in support of the warrant (1a), found the warrant valid, affirming the trial court's conclusion that "the apparatus [two chains and tarpaulin for handling metals] probably would have remained on the premises and the warrant was therefore not stale" (58a).[8]

[8] Petitioner submits that the holding by the court below on the first appeal that the warrant was stale is the law of the case and it was error to overrule its prior holding on the mere conjecture of the trial judge on remand.

Petitioner submits that the finding of probable cause to believe that the chains and tarpaulin would still be on the premises some six to seven months after the alleged thefts cannot withstand constitutional scrutiny.

It is axiomatic that probable cause for the issuance of a search warrant must be tested solely by the facts and circumstances set forth in the affidavit supporting the warrant. *Aguilar* v. *Texas,* 378 U.S. 108, 112 (1964). This axiom seems to have been completely ignored by those who reviewed the affidavit including the judge who issued the warrant, the trial judge and the court below. Judicial review of this search warrant is a classic example of "mere affirmance of belief or suspicion" which this Court has held is "not enough." *Ibid.*

There is not a single fact or circumstance in this affidavit to support the inferences of the trial court that the chains and tarpaulin had ever been removed from the alleged stolen metals, that such items would have been useful to the Carbones in their business or were not ordinarily bought and sold in that business, or that the items had any particular value. In fact, the *only* claim in the affidavit concerning the chains and tarpaulin was that they were alleged to have been delivered to Fairfield Scrap along with the stolen metals in January and February, 1971 (3a). Furthermore, nothing set forth in the affidavit remotely connects the attempted thefts from Carpenter in July, 1971 with the Carbones or Fairfield Scrap and Metal. An equally plausible inference is that the thieves had found another source for their stolen metals.

The finding of probable cause by the court below—based as it was on nothing remotely set forth in the affidavit, but

on the pure speculation of the trial judge—blatantly conflicts with this Court's pronouncement that the determination of whether there is probable cause to believe that the items to be seized *presently* exist on the premises to be searched "cannot be left to mere inference or conjecture". *Sgro* v. *United States,* 278 U.S. 206, 211 (1932).

Even assuming *arguendo,* however, that the warrant was not stale and the search party was legally on the premises, since the warrant itself did not authorize a search for business papers and records, the burden was on the state to justify the warrantless seizure of the "John Parks" receipt. *Bumper* v. *North Carolina,* 391 U.S. 543, 548 (1968); *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 221 (1973).

In finding that petitioner freely and voluntarily consented to the search for the sales receipts, the court below virtually ignored the facts and misapplied the law. Considering that there was massive police presence on the scene, that the police had already been searching the premises for an hour before the request to search for the sales receipts was made, that petitioner was not told that Constantino who made the request was a civilian, that petitioner was not informed that *no one* had authority to search for the sales receipts, and that petitioner had no knowledge that he could legally resist the search, the most that can be said for petitioner's "consent" is that he tacitly acquiesced and did nothing to prevent the search.

In an analogous situation, this Court has ruled that the burden on the State "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper* v. *North Carolina,* 391 U.S. 543, 549 (1968). The finding of free and voluntary consent by the court below

cannot stand in light of this Court's holding in *Bumper* that as a matter of law:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Ibid.*

This Court's balancing of the two competing concerns which must be accommodated in determining the meaning of a voluntary consent—"the legitimate need" for the search and "the equally important requirement of assuring the absence of coercion", *Schneckloth* v. *Bustamonte, supra* 412 U.S. at 227,—strengthens petitioner's claim of error. In the present case, the failure to obtain a warrant to search for the records was termed "an oversight" (30a, 52a). The police had waited over two weeks after the thieves had been apprehended to obtain the warrant for the stolen materials. Detective Cafferty knew and had informed the other members of the search party that they could *not* search for the sales receipts (30a, 153a). Rather than go back and obtain a legitimate search warrant, Detective Cafferty while on the way to the premises (30a, 31a, 53a), embarked on a deliberate, premeditated, albeit deceitful course of using a civilian to obtain consent from the Carbones.

Consent so obtained hardly comports with this Court's standards of voluntariness, and such improper police activity should not be condoned.

III.

The two thieves, Edwards and Scofield, were the principal State's witnesses; without them, simply, the State had no case. At all times since they were arrested in July of 1971, Edwards and Scofield cooperated fully with the authorities. After consultation with counsel, each gave complete statements to the State and, intending always to plead guilty, helped prepare the prosecution against the Carbones. Scofield, in fact, had already pleaded guilty to the thefts by the time of the deposition (11a).

During cross-examination of Scofield and Edwards, the defense proffered questions calculated to bring out the fact that each had pleaded the Fifth Amendment privilege in response to all questions asked in the course of depositions taken in a civil action brought by Carpenter Steel against the Carbones, Scofield and Edwards (10a, 68a). The purpose of the cross-examination, which was barred by the trial court, was to impeach the credibility of the State's two most crucial witnesses (10a, 68a).[9]

[9] The defense claimed that such reliance upon the privilege, long after they had decided to cooperate with the police and plead guilty was in bad faith. It demonstrated a pure desire to "help" the prosecution and to prevent the defendants from learning, in advance, what their testimony would be at trial. It was offered to show an interest on the part of both Scofield and Edwards in the outcome of the criminal trial, and to show bias against the defendants. Such inferences were permissible, intelligent conclusions that the jury might have drawn, and used in weighing the credibility of Scofield and Edwards.

The court below upheld the restriction on cross-examination on the basis that the invocation of the privilege could have been motivated by factors other than bias (68a). The question as to whether or not the jury would have thought *necessarily* that the invocation of the privilege showed bias is not truly the issue; rather, the question is whether or not there was a reasonable enough inference or argument of such bias that the defense should have been entitled to explore the matter.

The only case relied on by the court below to support its denial of petitioner's right to cross-examine the State's witnesses is *Grunewald* v. *United States,* 353 U.S. 391 (1957). But *Grunewald,* held it prejudicial error to allow the Government to cross-examine the defendant about his prior invocation of the privilege before the grand jury since the assertion of the privilege was consistent with the defendant's innocence and such cross-examination would be highly prejudicial to the defendant. *Grunewald* barred cross-examination to insure fairness to the defendant and, therefore, is wholly inapposite. Moreover the witnesses in the pending case had admitted their guilt and could not have been prejudiced by the questioning.

An individual under compulsion to make disclosure as a witness who revealed information instead of claiming the privilege has been held to lose the benefit of the privilege. *United States* v. *Kodel,* 397 U.S. 1, 7-10 (1970). More recently, in *Garner* v. *United States,* —— U.S. ——, 47 L.Ed.2d 366 (1976), this Court held that a taxpayer's incriminating disclosures on his tax returns instead of claiming the privilege, as he had a right to do, could subsequently be used against him in a federal criminal prosecution.

This Court, moreover, has consistently disallowed refusals to testify when there is no "real" and substantial "hazard of incrimination," see *Marchetti* v. *United States,* 390 U.S. 39, 48, 53 (1968), and has held that a witness who volunteered incriminating answers to the grand jury could not thereafter invoke the privilege as to details which

"would not further incriminate." *Rogers* v. *United States,* 340 U.S. 367, 373 (1950).[10]

Petitioner submits that Scofield and Edwards each had effectively waived his privilege against self-incrimination prior to its invocation during the civil proceedings. Having already confessed to their roles in the crimes, there was no real and substantial hazard of incrimination at the depositions.

A primary interest secured by the confrontation clause is the right of cross-examination which traditionally has allowed the cross-examiner "to impeach, i.e. discredit, the witness." *Davis* v. *Alaska,* 415 U.S. 308 (1974). In *Davis* this Court held:

> "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." 415 U.S. at 320.

Petitioner seeks review by this Court to resolve the tension between his right of confrontation under the Sixth Amendment and the privilege against self-incrimination of the Fifth Amendment invoked by the State's chief witnesses in prior proceedings. Petitioner submits that, under the circumstances of this case, his right to cross-examine the witnesses against him in order to impeach their credibility as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States should have prevailed.

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[10] A conflict exists among the Circuits as to whether a waiver of the privilege at one proceeding carries through to another proceeding but the sounder rule is that it does. *Ellis* v. *United States,* 416 F.2d 791, 800 (D.C. Cir. 1969).

CONCLUSION

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

By .....
Jacob D. Zeldes

By .....
Elaine S. Amendola

ZELDES, NEEDLE & COOPER, P.C.
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Bridgeport, Connecticut 06601
Attorneys for petitioner.

April 18, 1977

APPENDIX

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APPENDIX A

Search Warrant and Affidavit

SEARCH WARRANT AND AFFIDAVIT

TO: A Judge of the Circuit Court

The undersigned, being duly sworn, complains on oath that the undersigned has probable cause to believe that certain property, to wit:

(1) Precious pure nickel cathodes in pallet form stamped with initials INCO. (2) Copper inserts, square with rounded corners, ranging in wgt. from 2,500 to 4,000 lbs. (3) Braided Cable Chain with Bull Ring and L Hooks for lifting inserts. (4) Heavy Link Chain with an Oval Bull Ring. (5) Gray Tarpin Canvas, approx. 6′ x 12′, rope pulls on both ends. (6) Hanna Nickel described as small ingot form, rectangular in shape, approximately four to five inches thick, five to six inches wide and thirty inches long with weight of approximately fifty pounds each.

is possessed, controlled, designed or intended for use as a means of committing the crime of . . . Larceny in violation of Section 53-63, Conn. General Statutes.

was stolen or embezzled from . . . Carpenter Technology Corporation, Steel Division-Bridgeport, a Specialty Steel Manufacturer, where with other metals, nickel in pure form and copper is used.

And is within or upon a certain person, place, or thing, to wit . . . The property and buildings under the custody and care of Fairfield Scrap Iron & Metal, 158 State Street Extension, Fairfield, Connecticut.

And that the facts establishing the grounds for issuing a Search and Seizure Warrant are the following . . .

(1) At approximately 1:40 A.M., July 14, 1971, as a re-

sult of a stakeout surveillance at Carpenter Technology Corporation, a Specialty Steel Manufacturing Company, located at 837 Seaview Avenue, Bridgeport, Connecticut, City of Bridgeport Police Officers, along with Company Security Personnel, of the Sanitas Security Guard Service, and Robert J. Magee, Director-Industrial Relations, apprehended and arrested the following two men who were caught stealing and transporting with a truck approximately 3,000 lbs. of stolen pure nickel cathodes having a value of approximately $4,000.

(2) In the continuous investigation of an established, confirmed loss of copper inserts, precious pure nickel cathodes in pallet form by Detective Robert J. Cafferty of the Detective Division of the City of Bridgeport Police, in a loss value in excess of $99,830, the following two people were re-arrested again in the theft of twelve pallets of this precious pure nickel having a value of approximately $60,000.

(3) That I, Robert J. Cafferty, a Detective and Member of the City of Bridgeport Police Department, have in my possession executed affidavits from the following two persons who relate to me, under oath, that in the night season in a surreptitious manner they stole, transported with a truck precious pure nickel and copper inserts and sold them to the Fairfield Scrap Iron & Metal, delivered them to their property at 158 State Street Extension, Fairfield, Connecticut.

(4) That under oath, Russell J. Scofield, 34 years, 1171 North Avenue, Stratford, Connecticut and Albert A. Edwards, 37 years, of Northrop Road, Bethany, Connecticut, related to me in an Agreement with Peter Carbone these stolen items were accepted and received by him in the early

hours of the morning where he aided them by personally using a towmotor in the yard of this business to unload and conceal these metals, in deliveries as follows: In the month of January, 1971, they personally delivered two to three copper inserts, specific date of this transaction unknown; on January 24th, 1971, delivered five copper inserts and two sets of chains were left belonging to the company. On February 11, 1971, they delivered one pallet of nickel cathodes and three pallets of Hanna nickel. On February 20, 1971, they delivered twelve pallets of pure nickel cathodes. Further, that in the delivery and receiving of these metals after the thefts of them, Peter Carbone was at the Fairfield Scrap Iron & Metal Company to personally receive each and every load.

(5) Further, that also left on the delivery of these metals was a gray tarpan canvas stolen from the Carpenter Technology Corporation, roughly 6′ x 12′ long with rope pulls on each end that had six panels of canvas sewed together.

(6) Further, that on February 11, 1971 three pallets of Hanna Nickel described as small ingot form, rectangular in shape, approximately four to five inches thick, five to six inches wide and thirty inches long, with the weight of approximately fifty pounds each, was stolen. Hanna Nickel is approximately fifty percent pure nickel. The three pallets of Hanna Nickel stolen and delivered to Fairfield Scrap Iron & Metal totalled 12,000 pounds in weight.

(7) That based on the training and experience of the below named Affiant, I Robert J. Cafferty, a Police Officer currently in my 21st year, feel that there is reasonable grounds and probable cause for the issuance of a Search and Seizure Warrant to seize and secure in evidence the within named stolen items reported to be on the current

custody and care of the premises of Fairfield Scrap Iron & Metal.

The undersigned has not presented this application in any other court or to any other judge.

Wherefore the undersigned prays that a warrant may issue commanding a proper officer to search said person or to enter into or upon said place or thing, search the same, and take into custody all such property.

Signed at Bridgeport, Connecticut,

this 2nd day of September, 1971

s/Detective Robert Cafferty

Signed at Bridgeport, Connecticut,

this 2nd day of September, 1971

s/Robert J. Magee

JURAT Subscribed and sworn to before me this
2nd day of September, 1971

s/Sicilian, J.

STATE OF CONNECTICUT
CIRCUIT COURT

The foregoing Affidavit and Application for Search and Seizure Warrant having been presented to and been considered by the undersigned, a Judge of the Circuit Court, the undersigned (a) is satisfied therefrom that grounds exist for said Application, and (b) finds that said Affidavit establishes grounds and probable cause for the undersigned to issue this Search and Seizure Warrant, such probable cause being the following: From said Affidavit, the undersigned finds that there is probable cause for the undersigned to believe that the property described in the foregoing Affidavit and Application is within or upon the person, if any, named or described in the foregoing Affidavit and Application, or the place or thing, if any, described in the foregoing Affidavit and Application, under the conditions and circumstances set forth in the foregoing Affidavit and Application, and that, therefore, a Search and Seizure Warrant should issue for said property, namely the Fairfield Scrap Iron & Metal Company located at 158 State Street Extension, Fairfield, Connecticut, for said property.

(1) Precious pure nickel cathodes in pallet form stamped with initials INCO.

(2) Copper Inserts, square with rounded corners, ranging in weight from 2,500 to 4,000 pounds.

(3) Braided Cable Chain with Bull Ring and L Hooks for lifting inserts.

(4) Heavy Link Chain with an Oval Bull Ring.

(5) Gray Tarpan Canvas, approximately 6′ x 12′, rope pulls at both ends.

(6) Hanna Nickel described as small ingot form, rectang-

ular in shape, approximately four to five inches thick, five to six inches wide and thirty inches long with weight of approximately fifty pounds each.

NOW THEREFORE, by authority of the State of Connecticut, I hereby command any Police Officer of a regularly organized police department or any State Policeman to whom these presents shall come within a reasonable time after the date of this warrant to enter into or upon and search the place or thing described in the foregoing Affidavit and Application, to wit: The buildings and property under the custody and care of Fairfield Scrap Iron & Metal, 158 State Street Extension, Fairfield, Connecticut.

Search the person described in the foregoing Affidavit and Application, to wit: for the property described in the foregoing Affidavit and Application, to wit: (1) Precious pure nickel cathodes in pallet form stamped with initials INCO. (2) Copper inserts, square with rounded corners, ranging in weight from 2,500 to 4,000 lbs. (3) Braided Cable Chain with Bull Ring and L Hooks for lifting inserts. (4) Heavy Link Chain with an Oval Bull Ring. (5) Gray Tarpan Canvas, approximately 6′ x 12′, rope pulls at both ends. (6) Hanna Nickel described as small ingot form, rectangular in shape, approximately four to five inches thick, five to six inches wide and thirty inches long with weight of approximately fifty pounds each and upon finding said property to seize the same, take and keep it in custody until the further order of the court, and with reasonable promptness make due return of this warrant accompanied by a written inventory of all property seized.

Signed at Bridgeport, Connecticut,
this 2nd day of September, 1971

s/Sicilian. J.

RETURN FOR AND INVENTORY PROPERTY SEIZED ON SEARCH AND SEIZURE WARRANT

County of Fairfield, City of Bridgeport. Date of Seizure, September 2, 1971, State of Connecticut.

Then and there by virtue of and pursuant to the authority of the foregoing warrant, I searched the person, place, or thing named therein to wit: The property and buildings under the custoday and care of Fairfield Scrap and Iron Metals located at 158 State Street Ext., Fairfield and found thereon or therein, seized, and now hold in custody, the following property . . . None of the within named property. 9-2-71

Detective Robert J. Cafferty, Bpt. P.D.
Sgt. Edward Targowski, Fairfield Police

APPENDIX B

Findings of Superior Court for Fairfield County Concerning Rulings Made Prior to and During the Trial (Saden, J.)

983. The original informations against each of the defendants, dated October 5, 1971, charged a single count of violation of Section 53-63a, Connecticut General Statutes, charging larceny of the personal property of Carpenter Technology Corporation, Inc. in excess of Two Thousand ($2,000.00) Dollars. Motions for Bills of Particulars were filed by both defendants subsequent to the filing of the initial informations. However, the information in each case was superseded by a substituted information, in each case dated March 3, 1972, which charged each of the defendants with four separate counts of larceny in excess of Two Thousand ($2,000.00) Dollars, in violation of Section 53-63a of the Connecticut General Statutes. Each defendant, in identical Motions for a Bill of Particulars, asked, in Paragraph number 8 of said motions, "whether the state claims the defendant is a principal thief or receiver of stolen goods". In each case, the State objected to Paragraph 8 of the Motion for Bill of Particulars. In its Memorandum of Decision dated April 14, 1972, the court Saden, J, denied the defense requests of the State to specify whether the defendant was charged as the principal thief, a receiver of stolen goods, or an accessory, relying on an earlier ruling by the court, Tierney, J., to a similar effect when a similar motion had been addressed to the first set of informations against the defendants, and also indicating that the court felt the State was entitled to proceed in accordance with the court's reading of State vs. Palkimas, 153 Conn. 555, 563.

989. Prior to the institution of trial, both defendants filed identical Motions to Suppress Evidence, and to return property. Both motions were heard, in a pre-trial evidentiary hearing before Levine, J. At that time, Judge Levine ruled that a search of premises known as Fairfield Scrap Iron & Metal Company in Fairfield, Connecticut, on September 2, 1971, was in all respects legal, and overruled the motions by both defendants to suppress evidence. During the trial of the case, State's Exhibit O was marked for identification, and an issue arose concerning the procedure to be followed at the time State's Exhibit O, a slip signed with the name "John Parks" which had been taken from Fairfield Scrap on September 2, 1971, was offered as a full exhibit. Both defendants indicated to the court, at the trial, that Judge Levine had held an earlier evidentiary hearing concerning the admissibility of State's Exhibit O for identification. Both defendants renewed their objection to the admissibility of State's Exhibit O, in the absence of the jury.

The court ruled that it would not conduct another hearing on the issue of admissibility based upon the Motions to Suppress Evidence. The court indicated it was accepting the decision by Judge Levine as controlling in the case. The court indicated that both defendants had made their proper objection, at trial, on the question of admissibility on Fourth Amendment grounds, and the court overruled those objections.

The defendants excepted to that ruling, and to the admissibility and admission of State's Exhibit O.

992. Albert Edwards and Russell Scofield were the principal witnesses against the defendants, having testified on direct examination that they had spoken to the defendant Peter Carbone before making any thefts from Carpenter

Technology, and that they had made arrangements, prior to all of said thefts, for the defendants to purchase goods which they were stealing. On the cross-examination of the witness Albert Edwards, at a time when the jury was not in the court room, counsel for the defendant Peter Carbone made an offer of proof to the court.

It was indicated that defendants offered to show that, in connection with a civil action which had been brought by Carpenter Technology against the defendants Peter and James Carbone, and the witnesses Albert Edwards and Russell Scofield, that depositions had been noticed of Edwards and Scofield.

It was the position of the defendants that the assertion of the Fifth Amendment privilege on behalf of Edwards and Scofield in the civil action, at a time long after they had given full, complete and voluntary statements to the police which were extremely incriminating, showed not a fear that either of them would actually incriminate themselves, but only an unwillingness to give any information to the defendants or their attorneys, and thereby establish an inference that Scofield and Edwards were biased against defendants. In each instance, a voir dire was held outside the hearing of the jury. It was brought out that Edwards had given a full statement to the police on August 4, 1971. He had given another signed statement on September 1, 1971. It was at this time that he wanted to cooperate fully with the authorities, and tell them everything he had done. His attorney was present with him at the time he gave his September 1st, statement to the police. Edwards knew that, as of early morning on July 14th he was caught cold stealing about $3,000,000 worth of nickel, and that he was dead on that charge.

Edwards stated he asserted the Fifth Amendment privilege upon the advice of his attorney. He stated he did not know, at that time, whether or not he intended to testify for the State. Edwards knew, at the time he gave the statements to the police in August and September of 1971 that he was giving them material that was incriminating to him. He had been warned of his rights before he gave the incriminating material. Notwithstanding his knowledge that the statements to the police were incriminating, he gave them nevertheless. He had felt that it was better to just come clean with it and put himself in the hands of the authorities and make a clean breast of it. His position had consistently been, since August of 1971 that he would tell the police and the court as much as they wanted to know on his part, and make a clean breast of it.

Concerning proposed cross-examination of the witness Scofield on the same topic, an offer of proof was made that on August 3, 1971, Scofield had given a full statement to Detective Cafferty of the Bridgeport Police. No one had threatened him or promised him any reward for giving this statement, and the statement was voluntary and of his own free will. The statement was given only after consultation with his attorney, and that his attorney had advised him to cooperate with the police. Later, on September 3, 1971, Scofield gave another statement to the police and signed handwriting exemplars. He had his rights explained to him and nonetheless wished to give another statement. On September 27, 1971, he gave a third signed statement. Subsequent to giving the statements, he did not contest any bind over to the Superior Court and waived a hearing. He pleaded guilty to two charges in early February, 1972. At all times it was his intention to plead guilty, cooperate with the police, and testify against the

defendants. At a time after he had already pleaded guilty, and when it was his intention to cooperate with the police, he was called in by subpoena to testify at a deposition proceeding in the civil case. At that time, relying upon the Fifth Amendment privilege, he refused to answer any and all questions put to him. Scofield claimed that he refused to answer on the advice of counsel.

It was the defendants' position that, in both cases, any alleged reliance on the Fifth Amendment privilege was spurious and a sham. It was defendants position that any assertion of a privilege was bad faith, and showed the bias and prejudice of each of the witnesses, Scofield and Edwards, against the defendants. It was defendants' position that, based upon what had gone before, both Scofield and Edwards had waived any privilege against self-incrimination, and that, under the circumstances, at least an arguable inference from the assertion of the privilege was that it showed bias and prejudice against the defendants, and therefore was relevant to the jury in assessing the credibility of Edwards and Scofield. In each instance, the court sustained the objections of the State.

In each instance both defendants excepted to the court's rulings.

995. At the end of the State's evidence, the defendants filed a Motion to Dismiss the information, alleging that each count of each information was defective as duplicitious, in that they charged two separate crimes within each count of each information. Oral argument was had on the motions at which time the defendants contention was that in allowing the state to charge defendants with, in effect, committing both the crime of larceny itself, and also the crime of receiving stolen goods, all within a single

count or criminal charge, was duplicitious, and fatally defective. The court denied the motions, and both defendants excepted.

996. At the end of the State's case, both defendants filed Motions to Elect, whereby they moved that the court order the state to elect whether or not to proceed, on each count, on a theory of guilt based on whether the defendants were allegedly a principal, or accessory to the thefts themselves, or a theory of guilt based upon the Receiving Statute, 53-65, Conn. Gen. Stats. Argument was had, along with the Motions to Dismiss, wherein the defendants claimed that, as charged, if the defendants were subject to both theories of possible criminal liability, within a single count of the information, the counts were each duplicitious, and fatally defective. The court heard oral argument, and denied the motions. The defendants excepted.

APPENDIX C

Portions of Request to Charge

836. Defendant requests that the court charge, concerning the above defendant, on either the theory that said defendant is charged as a principal thief under Section 53-63a as supplemented by the general accessory provisions of Section §54-196—or as a receiver of stolen goods under Section 53-65—but that the court not put both theories to the jury.

APPENDIX D

Portions of the Charge to the Jury (Saden, J.)

905. Now, larceny is charged, as I have repeated, in each of these four offenses against each defendant. Included within the charge of larceny is another offense under Section 53-65, which does not appear on the face of this information but is nevertheless just as much before you as though it were. And Section 53-65 is the section known as the receiving and concealing stolen goods, knowing them to be stolen, or for a short name, receiving stolen goods.

906. In this case, if the State has proved its case under the rules laid down in this charge on the law, you may find the defendants—and I speak of each defendant when I say defendants—you may find the defendant guilty of either the offense of larceny or the offense of receiving and concealing stolen goods, but not of both offenses as to any one count.

907. Now, Sections 53-63(a) is the larceny statute, and it provides that any person who steals any goods of a certain value commits the crime of larceny in violation of that statute.

908. Now, a larceny is a theft. And a theft is defined as the taking and carrying away of money or personal property having some value from an out of the possession of the owner with the intent to defraud or deprive him of it, and to appropriate it to the use of the taker without excuse or color of right.

909. The first element embraced in the definition is the taking and carrying away of personal property of another. We are not concerned here with money, obviously.

910. The second element is the existence of a felonious intent in the taker to deprive the owner of money or the personal property permanently.

911. The third element is the lack of consent of the owner of the property to the taking. The phrase "felonious intent" as applied to larceny or theft simply means that the taker has no color of right or excuse to perpetuate the act of taking. Possession does not necessarily require that the owner actually have the personal property in his hand or in his person or in his pocket. It is in his possession if it is at the time subject to his control.

912. So far as this crime is concerned, ownership includes the possession of the property which a person is entitled to have for the time being.

913. Finally, you will remember I said to you that the taking must be without color or excuse. That is to say, the defendant must have taken the property with a wrongful intent. If for example, he actually and honestly believes under the circumstances of a given case that the money or property was his own, no matter if he was mistaken, he would not be guilty of a wrongful intent.

914. You will recall that the information states the value of the personal property stolen. In the crime of theft or larceny, it is necessary to prove the value of the property taken. If you find that the defendant was guilty of the crime of theft, and that the amount or value of the prop-

erty stolen was as alleged in the information, when you return to the courtroom and you are asked whether you find the defendant guilty as charged as to each count, you will answer guilty. But if you find he stole the property but the value was not as stated in the information, your verdict then would be guilty of theft of property of the value of whatever value you find that value to be. And, of course, if you find that he stole property of no value, then, of course, he would not be guilty of the crime of larceny.

915. Now, what a man's purpose or intention or knowledge has been is necessarily very largely a matter of inference. In this case, the only way in which a Jury can determine what a man's purpose, intention or knowledge was at any given time is by determining what that man's conduct was and what the circumstances were surrounding that conduct, and from those circumstances and all those facts infer what his purpose, intention or knowledge was. To draw such an inference is not only the privilege but also the duty of a jury, provided, of course, the inference drawn is a reasonable inference.

916. In this case it will be part of your duty to draw all the reasonable inferences from the conduct of the defendant in light of the surrounding circumstances as to what purpose, intent or knowledge was in the mind of each defendant at the various times in question.

917. Now, in connection with the charge of larceny in each of these informations, there is another statute relating to accessories to a crime which comes into play and does not appear on the face of these informations but is

nevertheless a statute that you must consider in reaching your determination of guilt or innocence on each count. This is Section 54-196 of the General Statutes, which reads as follows:

918. "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

919. Now, in this case, I do not think there is any evidence upon which the State could base a claim that these defendants caused or hired or commanded Scofield or Edwards to commit the larceny so that, you can dismiss from your minds those three words. But that still leaves the words "Any person who assists, abets or counsels another to commit an offense may be prosecuted as a principal."

920. The State does not claim in this case that the defendants personally engaged in moving metal off of the owner's premises, but it does claim that Edwards and Scofield did, and that the defendant is chargeable as a principal offender under the statute I have just read to you, because the defendant in each case was an accessory under the statute. If the defendant did any one of these things specified in the accessory statute as I have just explained it to you, leaving out the three words "causes, hires or commands," he is in the eyes of the law just as guilty of the crime charged as though he had directly committed it or directly participated in its commission.

921. I want to particularly emphasize to you that the statute does not connect the various things its specifies by the word "and," but instead it separates them by the word

"or." It reads: "Assists, abets or counsels." The defendant is guilty of the crime charged if he assisted in any way in its commission, or if he abetted it or if he counseled it. The words of the statute are clear, except perhaps the word "abet," spelled a-b-e-t. And here the word means, did he encourage or incite the commission of this crime. To find the defendant guilty, you must however, decide that he did more than just passively acquiesce in it or innocently perform certain acts which in fact did aid in the commission of the offense. Unless there was a criminality of intent and an unlawful purpose in common with the actual perpetration of the crime, he is not guilty under the statute. If you find beyond a reasonable doubt that he did any of these things specified in the accessory statute with that criminal and common intent, he is just as much guilty of the crime of larceny as though he had himself committed it, and your verdict would be that he is guilty of larceny. If you do not find that to be so beyond a reasonable doubt, then he is entitled to an acquittal.

922. Every one is a party to an offense who actually commits the offense or does some act which forms part of the offense or directly or indirectly counsels any person to commit the offense or do any act forming a part thereof. So much for the accessory statute.

We come now to the statute relating to receiving stolen goods. And I will use that short title to refer to that whole statute. You will recall that I mentioned the statute on larceny permits proof of the offense of receiving stolen goods. And I will now read to you the language of Section 53-65 of the General Statutes, which describes this offense. It reads as follows:

923. "Any person who receives and conceals any stolen goods or articles knowing them to be stolen shall be prosecuted and punished as a principal, although the person who committed the theft is not convicted thereof."

924. What this states, as you can see, is that a receiver and concealer of stolen goods who knows they are stolen shall be punished as though he actually stole the goods himself in the first place, even though the person who in reality committed the theft is not yet convicted of the offense.

925. The elements of the crime of receiving stolen goods are as follows:

1. The personal property must have been stolen; and

2. It must have been received by the defendant with the knowledge that it was stolen; and

3. It must have been concealed; and

4. It must have been received and concealed without color of right or excuse.

Of course, the State must prove all of these elements beyond a reasonable doubt before the defendant can be found guilty.

926. As to the first element, the property must have been stolen. Stealing is the taking away of property from one who owns or possesses it with the intent of depriving him of it and converting to the takers own use without color of right or excuse. As far as the offense of receiving stolen goods is concerned, it does not matter who stole the property or through how many hands it passed. All you need to determine is that the property was stolen property.

927. Second, the stolen property must have been received by the defendant with knowledge that it was stolen. To receive means to take into one's actual possession.

928. The State has offered direct evidence that the defendant, when he received this property in each case, if you find that he did receive it, knew that it was stolen. The State has also offered circumstantial evidence, including the conduct of each defendant when he received it and immediately thereafter, from which you are asked to infer that knowledge which claims you can and should do if you decide from such evidence that the only reasonable conclusion to be drawn is that the defendant did know that the property had been stolen. Thus the State claims and has offered evidence, direct and circumstantial, to prove actual knowledge on the defendant's part that the property was stolen. And if this evidence satisfies you beyond a reasonable doubt, then you must find actual knowledge did exist.

929. Third, you must be satisfied that, having received the goods, knowing them to have been stolen, the defendant concealed them. Now, conceal as used in this statute has a broader meaning than that in which one ordinarily might use the word, which is to hide. It, of course, includes hiding, but the requirement of concealment is met if the defendant did anything which would make the discovery or identification of the property more difficult.

930. As I have said, the word "conceal" is not to be limited to the literal and technical construction of the word "hiding." It can include the handling of property in a manner which would throw the owner off guard in his

searching for it. It can include any conduct which will assist the defendant in converting the property to his own use and enjoyment, or which may hinder or prevent its discovery by an owner, such as, for example, quickly disposing of it, covering it in whole or in part, placing it in any place where it is not likely to be seen, removing any identification from the property. Hence you can understand that conceal as used in this statute includes a very broad scope of conduct with reference to the stolen property.

931. Finally, the State must prove that the defendant acted without color of right or excuse. By this, I mean that he must have acted with criminal intent. Here again, the State has offered evidence, both direct and circumstantial, bearing on the question of the defendants' intent in each case. If you are satisfied beyond a reasonable doubt that the defendants' conduct established a criminal intent on his part, the State has proved this element of the charge. Intent is criminal if its object is to aid the thief in any manner, whoever the thief may be. And it is criminal if it wrongfully seeks to deprive the true owner permanently of the property in question.

932. As in the case of larceny, you must also consider the value of the property claimed to have been received as stolen goods. If you find the defendant guilty of this offense, when you return to the courtroom and you are asked whether or not you find the defendant guilty of the offense of receiving and concealing stolen goods knowing them to be stolen, you will state that you do find the defendant guilty of receiving stolen goods of the value of whatever value you may find that to be if it is less than

the amount stated in the information. If it is the same amount as stated in the information, then you may simply say so. And if there is no value proved to your satisfaction under the law, you will render a verdict of acquittal.

933. Now, value as already indicated must be proved under the offense of receiving stolen goods just as it does under the larceny charge. The expressions "actual value," "fair market value" or "market price," whether applied to any article, means essentially the same thing. They mean the price or the value of the article usually established or shown by sales, public or private, in the way of ordinary business. In this case, we are concerned with the market value of the various items alleged in the State's information as having been stolen. Such value is a matter of opinion, and there is no rule of law that any particular method must be folowed to prove it.

934. We are, of course, concerned here with the value of these items in terms of what a consumer such as Carpenter Technology or any other consumer on the same level of activity, of commercial activity, would be likely to pay for such materials on the market. And their value would be the price such a consumer would pay for each item on the open market in the ordinary course of business during the period of January and February of 1971.

935. One other thing on value. The State is not obliged to prove the exact value of the property stolen as alleged in the information. It is sufficient to prove a value in excess of two thousand dollars, whatever that amount of excess may be. If you find that the value is in excess of two thousand dollars, that is as far as you need to go as to value as to each count. If you find as to any count the value

is less than two thousand dollars, then you will report whatever lesser value you may find when you return your verdict. And, of course, if you find there is no value, you would have to acquit as to such count on which you so find.

936. Now, in this case, there is no evidence that at the time of the defendants' arrest, which occurred some six months after January or February, 1971, there is no evidence that either at the time of the arrest or thereafter that there was any stolen goods in either defendants possession. There is, of course, evidence before you for your consideration showing that certain articles of metal goods were in defendants' possession at or about the time alleged in the four counts of the information, and that they were stolen goods. And you must evaluate this evidence with all of the other evidence in the case.

937. Now, the questions which you must decide are as follows:

1. Is the defendant—and I refer to each defendant separately—guilty of larceny as to one or more or all of the counts in each case; or

2. Is the defendant guilty or receiving stolen goods knowing them to be stolen as to one or more or all of the counts in each case; or

3. Is the defendant not guilty of any offense as to one or more or all of the counts in each case.

938. First, when I speak of the larceny counts, you must keep in mind not merely the receiving stolen goods count, you must keep in mind the accessory statute. The accessory statute affixes itself to the larceny count. The receiving stolen goods charges, which are not alleged in the information but are nevertheless before you, do not become involved with the accessory statute at all, and you can forget the accessory statute as far as receiving stolen goods is concerned. As I have previously mentioned to you, you cannot find the defendant as to any one count guilty of both larceny and of receiving stolen goods. As to each count, it must be either one or the other or not guilty.

939. Now, neither defendant was ever present on the Carpenter Technology premises. That is conceded by the State. Nevertheless, the State does claim under the accessory statute, which I explained to you before, that the defendant assisted or abetted or counseled Edwards and Scofield to commit the offense of larceny, and for this reason the defendant is punishable as a principal offender under the larceny statute as permitted by the accessory statute. As to each count in the information, it is for you to determine upon all of the evidence, both direct and circumstantial, offered by either side whether or not the defendant in question assisted or abetted or counseled Edwards and Scofield prior to the time each theft occurred by any words or act, such as advising them as to what kinds of metals to steal, or in any other manner that you may recall from the evidence. If you find from all of the evidence that either or both defendants as to each count did conduct himself with reference to that count in the manner of an accessory, as already defined for you, then you must find such defendant or defendants guilty of larceny as to that count. And the same is true of every count in each information.

940. Of course, I remind you again that you should consider each defendant separately and each count under each information should be considered separately. If you find as to any counts the defendant did not conduct himself

as an accessory before the offense, then as to that count that defendant would be not guilty of larceny, and you must then consider whether the defendant was guilty of receiving stolen goods rather than larceny, as I defined previously the offense of receiving stolen goods for you.

941. Because a defendant is charged with larceny, while he may not be guilty of larceny, he may nevertheless be found guilty of receiving stolen goods, provided the State has met its burden of proof under the receiving statute as I have explained it. If under the circumstances you find the defendant guilty of receiving stolen goods as to one or more or all counts, when called upon by the Clerk in open Court to report your verdict as to each count, you will say as to such count not guilty of larceny, but guilty of receiving stolen goods of a value of whatever value you will place upon the property. And, of course, if you find the defendant as to each count is not guilty of larceny, and that he is not guilty of receiving stolen goods as to such count, you will return a verdict of not guilty as to both charges as to such count.

APPENDIX E

Exceptions to the Charge

979. The only other thing,—I think it is covered in my motion—I do want to except to your Honor's charging—without arguing—charging on both receiving under 54-196.

The Court: We have been over this, Mr. Grudberg.
Mr. Grudberg: I just want to make sure.

980. The Court: I don't want you to repeat yourself. It is on the record. We have been over it at least twice and more. Let's not go over it any more. You have covered it all on the record. You are going to have to raise the question on the appeal if you ever go up on appeal. There is no need to keep repeating yourself.

APPENDIX F

Opinion and Judgment of the Supreme Court of Connecticut, Reversing and Remanding to the Superior Court

SUPREME COURT

NOVEMBER TERM, 1974

STATE OF CONNECTICUT v. PETER CARBONE

STATE OF CONNECTICUT v. JAMES CARBONE

Substituted informations charging each defendant with four counts of the crime of larceny, brought in the Superior Court in Fairfield County; motions by the defendants to suppress denied by the court, *Levine, J.*; trial in each case to the jury before *Saden, J.*; verdict and judgment in each case of guilty on all counts and appeal by the defendants. *Error in part; further proceedings.*

Ira B. Grudberg, for the appellant (defendant) in the first case.

Raymond W. Beckwith, with whom, on the brief, was *George N. Thim,* for the appellant (defendant) in the second case.

Joseph T. Gormley, Jr., chief state's attorney, with whom, on the brief, were *Donald A. Browne,* state's attorney, and *Richard F. Jacobson,* assistant state's attorney, for the appellee (state) in both cases.

MACDONALD, J. Each of the defendants was tried upon a substituted information charging him with four counts of larceny of personal property in excess of two thousand dollars. The jury returned a verdict of "guilty as charged" on each count as to both defendants. The defendants each appealed and the appeals were combined by stipulation of counsel. Prior to trial of the issues, the defendants filed several similar motions and supplemental motions to suppress a receipt bearing the name "John Parks" which had been obtained from the premises of Fairfield Scrap Iron and Metal Company, hereinafter Fairfield Scrap, located in Fairfield. A hearing was conducted on these motions and they were denied. In their assignments of errors the defendants have raised a multitude of issues concerning both the denial of the motions to suppress and the conduct of the trial, but our ruling with regard to the motions to suppress obviates the necessity of discussing the issues raised with regard to the trial.

The finding with respect to the motions discloses the following facts: In July of 1971, Detective Robert J. Cafferty of the Bridgeport police department became involved in an investigation of thefts of precious metals from the Carpenter Technology Corporation, hereinafter Carpenter, in Bridgeport. On September 2, 1971, Cafferty and Robert J. Magee, an employee of Carpenter, applied for and obtained a search and seizure warrant for the premises of Fairfield Scrap. The warrant commanded a search for a variety of named precious metals, and other items employed in the theft of those metals. Prior to making application for the warrant, Cafferty had been informed by Albert Edwards and Russell Scofield, the men admittedly directly responsible for the thefts, that the name "John Parks" had been used on one of the receipt slips signed at

Fairfield Scrap where they claimed to have delivered the stolen items. Through an oversight, Cafferty failed to seek the inclusion of the "John Parks" receipt or, indeed, of any slips or receipts involving Scofield, Edwards or "John Parks," in the list of items authorized to be seized.

The warrant was executed on September 2, 1971. With Cafferty and Magee at the time of the execution of the warrant were Henry Popowski, an employee of Carpenter, who was present in order to identify items that might be found belonging to Carpenter, and Alfred Constantino, a special investigator for Federal Insurance Company of New York, who was aiding and assisting Detective Cafferty in the investigation and was present during the search in connection with Carpenter's claim with regard to the loss of the metal. Patrolman John Sleeper, a photo technician of the Bridgeport police department, Detective Stephen Zadrovitz and Sergeant Edward Targowski of the Fairfield police department, and Special Agent Edward Buffum of the F.B.I. also assisted Cafferty in the search. None of the law enforcement officers was in uniform.

Magee, Popowski, Constantino and Patrolman Sleeper accompanied Detective Cafferty, in his police car, to Fairfield Scrap, and there was a general conversation en route about whether they might find anything with Edwards' name or Scofield's name on the Fairfield Scrap premises. Cafferty told the others not to search for anything, but that if they happened to see anything with those names on it, to let him know. He also mentioned that there might be paper work or slips. There also was a discussion concerning "John Parks," or slips possibly bearing that name. Cafferty instructed the others that they were not allowed to search for slips with the name "John Parks" because such items were not named in the warrant. He told them

that if they ran into the names Scofield, Edwards or "John Parks" it could be meaningful, and he admonished them to "keep their eyes open" for those names and to tell him if they saw those names at all. Popowski understood Cafferty's advice to mean that if he saw the names Scofield, Edwards or "John Parks" on a piece of paper, he should say something, but that it was not intended that he actually go and look for them. No indication was given to Popowski that the name "John Parks" might be found on a receipt of Fairfield Scrap.

Fairfield Scrap is a sole proprietorship owned by James Carbone, and Peter and Frank Carbone are the sons of James and employees of Fairfield Scrap. The Carbones are hereinafter individually referred to as James, Peter and Frank and collectively as the Carbones. Upon arrival at Fairfield Scrap, Sergeant Targowski sought out Peter and informed him that they were present with a search warrant, and read to him from the warrant the items for which they were searching. Peter threw up his hands and said: "Go ahead and look." He and Targowski then accompanied Cafferty inside the main building where Cafferty began looking through closets for items named in the warrant. James arrived a few minutes later. Targowski had the warrant in his hand at this time and showed it to James but he could not be sure if he read any portions of it to James. James asked Targowski some questions, but Targowski referred him to Cafferty, since Cafferty was familiar with the warrant. James never took the warrant and read it. Targowski then returned the warrant to Cafferty, who went upstairs to the rear office and gave Peter and James the *Miranda* warnings. Cafferty advised Peter that he was present legally for a search and seizure, and Peter did not at that time ask Cafferty to read the warrant in its entirety.

Along with the police officers, the civilians who had arrived with them went around the premises assisting the officers, since they were familiar with the items being sought. The men searched the premises and the building. At various times during the search, Cafferty was accompanied by the civilians, Popowski and Magee, Patrolman Sleeper, Sergeant Targowski and Detective Zadrovitz. Nothing was found on the premises that was listed in the warrant.

At some time after Cafferty arrived, Constantino asked him whether he could look at the sales receipts, paper slips or sales slips of Fairfield Scrap. Cafferty told Constantino that he could do so only if he obtained the voluntary permission of the Carbones. In Cafferty's presence, Constantino asked Frank if he could look at the sales receipts and slips. Cafferty said nothing, although he knew that a possible result of Constantino's question would be that Constantino would look through the slips and that if he found anything with the names Scofield, Edwards or "John Parks" on it, he would show it to Cafferty. In reply to Constantino's request, Frank asked James, and James replied: "Well, I see no reason why he shouldn't see them. Fine, let him have them." Frank indicated to Constantino that he could see the business slips, and James then asked Frank: "Where do we keep them?" Frank produced the slips and Cafferty then left the area. Popowski and Constantino looked through the records although neither man had asked the Carbones whether Popowski could inspect these items. Neither man had informed the Carbones who he was or why he was present. Neither man had sought the permission of the Carbones to be on the premises. Constantino considered himself validly there under the terms of the warrant and at the invitation of the police. In viewing the slips, Constantino and Popowski were looking for the names Scofield, Edwards and "John Parks."

Popowski came across a slip signed by "John Parks" and then went outside and told one of the police officers. Cafferty was advised of the discovery and returned to the scale room. When he arrived back no police officers were present. Cafferty asked Frank in James' presence if he could have the slip or a copy of it. Frank agreed, but said that he would have to have a copy of it for the business. Cafferty took the original and one photostatic copy and left a photostatic copy with the Carbones. The slip was discovered approximately an hour or an hour-and-a-half after the search was begun. After the slip was discovered, Constantino did not ask the Carbones whether he could show the slip to the police. The Carbones were not asked to sign a consent to search form nor were they advised that the seizure of the slip was beyond the scope of the warrant. Cafferty never discussed the presence of the civilians with the Carbones nor did he seek their permission to have Constantino on the premises. Targowski saw Constantino and Popowski going through the slips and did not ask what they were doing, although he was aware that there was no authority under the warrant to search for or through said items.

Constantino was a New York detective for eighteen years prior to joining Federal Insurance Company of New York. Cafferty had arranged to invite Constantino so that he could aid and assist the police, if he observed or noted anything, and as another person to look around, although Constantino had no police powers. Popowski was asked by Constantino to help him look through some records. He handed Popowski a pile of slips and asked him to look through them for the names Scofield, Edwards or "John

Parks." Peter was not in the room when the slip was discovered, but accompanied Targowski to make the photostatic copies upstairs.

The "John Parks" receipt was admitted at the trial of Peter and James. The record discloses that the state's case in the main part hinged upon the credibility of the witnesses Scofield and Edwards, and the "John Parks" slip appears to have been a determinant in the jury's consideration of their credibility. Thus, if illegally seized, its admission was highly prejudicial to the defendants.

In its memorandum on the defendants' motions to suppress, the court ruled that Peter had no standing to contest the seizure, that a determination of the validity of the search warrant was unnecessary since the court found that the seizure was grounded upon consent, that the consent was voluntary, and that the seizure was not subject to challenge under the fourth amendment to the United States constitution or § 7 of article first of the Connecticut constitution, since it was effected by private citizens.

On the question of the standing of Peter the court ruled: "The evidence discloses that Peter had no interest in the premises searched, or the slips voluntarily turned over to Constantino and Popowski, since the premises and its contents were owned solely by James Carbone. He is therefore not a person aggrieved by the search which took place here."

The protection of the fourth amendment extends to commercial premises. *Mancusi* v. *DeForte,* 392 U.S. 364, 367, 88 S. Ct. 2120, 20 L. Ed. 2d 1154; *See* v. *City of Seattle,* 387, U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943. Furthermore, the fourth amendment does not shield only those who have title to the searched premises. *Mancusi* v. *DeForte,* supra, 368. One with a possessory interest in the premises might also

have a standing. *Jones* v. *United States,* 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697. Further, anyone legitimately on the premises where a search occurs may challenge its legality when its fruits are proposed to be used against him. *Jones* v. *United States,* supra, 267. See *State* v. *Castle,* 161 Conn. 570, 572, 287 A.2d 744: *State* v. *Oliver,* 160 Conn. 85, 92, 273 A.2d 867, cert. denied, 402 U.S. 946, 91 S. Ct. 1037, 29 L. Ed. 2d 115. The United States Supreme Court has steadfastly recognized the principle that fourth amendment rights are personal rights which may not be asserted vicariously. *Alderman* v. *United States,* 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176; *Simmons* v. *United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247; *Jones* v. *United States,* supra. However, in *Brown* v. *United States,* 411 U.S. 223, 228, 93 S. Ct. 1565, 36 L. Ed. 2d 208, its most recent pronouncement on the issue of standing, the court clearly reaffirmed the principle that presence on the premises at the time of the search and seizure is sufficient to confer standing, and summarized its holding (p. 229) as follows: "In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. The vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes, is not present."

Peter had been present on the premises during the entire search. Although the record does not indicate that he was in the scale room at the time of the discovery of the "John

Parks" slip, he did accompany Targowski to photostat the slip. The premises of Fairfield Scrap is comprised of an outside storage area, a main building, and several shacks. The warrant authorized a search of this entire area. The finding discloses Peter's presence in the main building at several points prior to and after the seizure and this is sufficient to bring him within the purview of *Jones* and *Brown*. The court instead, ruled that the search was not directed at Peter, and that since James was the sole proprietor of Fairfield Scrap, Peter did not have a sufficient possessory interest under *Jones* to have standing. We cannot agree with either ruling. When Sergeant Targowski entered the premises he sought out Peter and read him the warrant. Detective Cafferty advised Peter and James of their constitutional rights. In paragraph four of the affidavit of Detective Cafferty and Robert Magee submitted in support of their application for the search warrant, which affidavit is printed in full in an appendix to Peter's brief, and which was made part of the finding, reference is made to the sworn statements of Scofield and Edwards, in which they state that the stolen items were received and accepted by Peter. The investigation certainly had focused upon Peter at this time, and the fact that the Warrant commanded a search of the premises and did not expressly name Peter in its command is no indication that the search was not directed at him. The warrant sought the seizure of items concerning which the state was to contend, at the trial, that Peter had sufficient control over their appropriation to be held as a principal in their theft.

The Supreme Court in *Jones* (p. 266) declined to impose upon the law of search and seizure "distinctions . . . only of gossamer strength" between the principles of private property law such as "invitee," "licensee," "guest" and

"lessee," but conferred standing on those legitimately present on the premises where a search occurs, stating (p. 267): "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established . . . consent to his presence . . . he was entitled to have the merits of his motion to suppress adjudicated." Thus, the denial of sufficient possessory interest in the premises in Peter, based on a finding that James was sole proprietor of the company, is far too strict and creates a standard in contravention of *Jones* and *Brown*. James had standing to contest the search warrant.

The denial of standing to Peter, in and of itself, does not necessitate a vacation of the conviction if the issues that he sought to raise are sufficiently presented in the record to allow this court to rule upon them. *Jones* v. *United States*, 362 U.S. 257, 272, 80 S. Ct. 725, 4 L. Ed. 2d 697. However, preliminary to its ruling on the question of consent, the court declined to entertain the defendants' challenge of the validity of the search warrant. In *State* v. *Memoli*, 159 Conn. 433, 436, 270 A.2d 543, this court reiterated the standards by which the voluntariness of a claimed consent is to be judged: "Not every search made without a warrant is unlawful. A search which is made with the full consent of the defendant may be lawful provided the state affirmatively establishes the consent is voluntary. *State* v. *Miller*, 152 Conn. 343, 347, 206 A.2d 835. The question is one of fact to be decided by the court upon the evidence and such rea-

sonable inferences as can be drawn from it. *State* v. *Hanna,* 150 Conn. 457, 471, 191 A.2d 124. All of the surrounding circumstances are pertinent to the question of voluntariness. *State* v. *Hassett,* 155 Conn. 225, 230, 230 A.2d 553." See also *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854.

The illegality of a warrant under the authority of which entry is gained is a factor to be considered on the question of voluntariness. *Bumper* v. *North Carolina,* 391 U.S. 543, 549, 88 S. Ct. 1788, 20 L. Ed. 2d 797; *Earls* v. *State,* Tenn. , 496 S.W.2d 464. The state has the burden of proving that consent is not tainted by reason of the primary illegality. *Schneckloth* v. *Bustamonte,* supra; *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441. The primary attack upon the search warrant involved here is that the information contained in the affidavit, relating to probable cause to believe that the items sought are upon the premises, is stale. Peter has printed the search warrant application in an appendix to his brief and, as an exhibit at the hearing, it was made part of the finding without having to be printed, and thus may be considered. Paragraph one of the application indicates that Scofield and Edwards were not apprehended until July 14, 1971. Paragraph four of the affidavit reveals that Scofield and Edwards made deliveries of certain precious metals, stolen from Carpenter, to Peter on the premises at Fairfield Scrap, on four dates: January 24, 1971, another unknown date in January, 1971, February 11, 1971, and February 20, 1971. In paragraph seven Detective Cafferty, one of the affiants, states that the items sought are "reported to be on [sic] the current custody and care of the premises of Fairfield Scrap Iron & Metal." No indication is given of the source of this report or of its reliability.

"The recital [of the underlying circumstances in the affidavit] must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State* v. *DeNegris,* 153 Conn. 5, 8-9, 212 A.2d 894, citing *Sgro* v. *United States,* 287 U.S. 206, 210, 53 S. Ct. 138, 77 L. Ed. 260. "The facts and circumstances set forth in an affidavit submitted in support of the issuance of a search warrant should be current and timely, so as to indicate that the premises, person, place or thing to be searched PRESENTLY contains the fruits of the crime. . . ." Markle, "The Law of Arrest and Search and Seizure," p. 223. An exception to this rule is where the court finds facts indicating the likelihood that there is a continuing criminal activity. *United States* v. *Mustone,* 469 F.2d 970 (1st Cir.); *United States* v. *Johnson,* 461 F.2d 285 (10th Cir.); *State* v. *Austria,* Haw. , 524 P.2d 290; *Johnson* v. *State,* 14 Md. App. 721, 288 A.2d 622; note, 100 A.L.R.2d 525, 542; Markle, supra, 226.

The facts indicating this continuity must satisfy the same requisites of reliability as other facts within the affidavit that purport to evidence probable cause. An affidavit that merely states the affiant's belief that there is cause to search without stating facts upon which that belief is based does not establish probable cause. *Nathanson* v. *United States,* 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed. 159. Thus the unsupported observation by Detective Cafferty that the items are "reported to be on [sic] the current custody and care of the premises" is insufficient to establish continuity, and, thus, we are unable to find that there is a substantial basis for the issuing judge's conclusion that probable cause presently existed. *State* v. *DeNegris,* supra. A lapse of just over six months occurred between the latest noted delivery to Fairfield Scrap and the issuance of the warrant. By their testi-

mony at the trial Scofield and Edwards indicated that the Carbones did not intend to keep the stolen items on their premises very long. In fact, with regard to the Hanna nickel named in the command of the warrant, the Carbones indicated it was worthless and they would have to bury it. There clearly was merit to the claim that the warrant was stale and the court erred in failing to consider this circumstance in determining the issue of consent.

The court next concluded that the search and seizure of the "John Parks" slip was conducted by private citizens and was thus not within the purview of the fourth and fourteenth amendments. Despite this conclusion, the court went on to rule that there was a voluntary consent to this seizure, a ruling the necessity for which would appear to have been obviated by its conclusion presently under consideration. Neither the state nor counsel for Peter has briefed this issue although the consent issue was briefed extensively by all parties. If, in fact, this had been a seizure by a private citizen not acting in concert with or as an agent of the police, nor assisting them at their direction, its validity would not have hinged upon the authority of the warrant nor upon the validity of any purported consent. It simply would have been outside the purview of the protections of the constitution; and, although it may have been obtained as a result of a trespass actionable in the civil courts, its use in criminal prosecutions could not have been challenged. For the reason, seizures of this nature must be scrutinized carefully, for it is only the autonomous private seizure, free from police institgation and concert, that is expected from the proscriptions of the fourth amendment.

The rule of admissibility of the fruits of private seizures stems from *Burdeau* v. *McDowell,* 256 U.S. 465, 474-76, 41 S. Ct. 574, 65 L. Ed. 1048 and it's the rule in most jurisdictions that the exclusion will apply to evidence obtained by a private citizen only where the police through suggestion, order or request, made the private person their agent for purposes of criminal investigation. See *Corngo* v. *United States,* 367 F. 2d 1 (9th Cir.); *Moody* v. *United States,* 163 A.2d 337 (D.C. App.); *Machlo* v. *State,* 248 Ind. 218, 225 N.E.2d 762; *Thacker* v. *Commonwealth,* 310 Ky. 702, 221 S.W.2d 682; *State* v. *Scrotsky,* 39 N.J. 410, 189 A.2d 23; note, A.L.R.3d 553, 590. Courts must, therefore, be concerned with the actuality of the share by the government agent in the total enterprise of securing and selecting evidence by other than sanctioned means. Note, 36 A.L.R.3d 553, 590, and authorities cited therein.

The portions of the finding relevant to this question indicate that Constantino and Popowski were present at the invitation of the police and under the authority of the warrant. They were instructed not to search but to disclose anything bearing the name Edwards, Scofield or "John Parks." They were further instructed that in order to examine items not named in the warrant they would have to seek permission from the Carbones. It was never indicated to the Carbones that they were not police officers. Their express purpose in accompanying the police was to assist the officers in identifying items named in the warrant, and they accompanied the officers in searching various portions of the premises. Upon discovering the "John Parks" slip they immediately sought out Detective Cafferty, who then negotiated with the Carbones for the original and a copy of the slip. These men at all times were assisting and acting at the instigation of the executing officers. They were present at the invitation of the police and the manner and scope of their explorations were dictated by the police. It was an enterprise of mutual assistance, and the actions of

Popowski and Constantino, thus, must come within the countenance of the fourth amendment.

The following language from the United States Supreme Court's most recent annunciation on the issue of consensual searches is pertinent to the ultimate determination whether, upon all the circumstances, the consent herein can be deemed to have been voluntarily given: "[t]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 228, 93 S. Ct. 2041, 36 L. Ed. 2d 854.

In summary, it was error for the court to deny the defendants' motions to suppress without considering all of the circumstances surrounding the purported consent to search, including any question as to the invalidity of the search warrant itself. "[I]f under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable." *Schneckloth* v. *Bustamonte,* supra, 233. Since it is obvious from the record that this error was prejudicial to the defendants, it is not necessary to consider the assignments of error directed to the trial.

There is error, the judgement is set aside in each case and the cases are remanded to be proceeded with in accordance with this opinion.

In this opinion the other judges concurred.

APPENDIX G

Joint Memorandum of Decision of Judge Levine of August 1, 1975

These matters have been remanded to this court to be proceeded with in accordance with the Supreme Court's opinion: *State* v. *Carbone,* Conn. (36 Conn. L.J., No. 37, pg. 5, 10). The remand is for the purpose of having this court determine whether the search warrant was "stale" and, therefore, invalid and its effect on the respective defendants' motions to suppress which the court had previously denied. "In summary, it was error for the court to deny the defendants' motions to suppress without considering all of the circumstances surrounding the purported consent to search, including any question as to the invalidity of the search warrant itself. '[I]f under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable.' Schneckloth v. Bustamonte, supra [412 U.S. 218, 228, 93 S. Ct. 2041, 36 L.Ed.2d 854], 233." *State* v. *Carbone,* supra, p. 10.

The investigation of thefts from the Carpenter Steel Company began in July of 1971 and continued into the month of September, 1971. The search warrant for the premises of Fairfield Scrap was issued on September 2, 1971. The affidavit attached to the search warrant set forth that there had been several thefts of metals and apparatus for moving the metals during the months of January and February and that in July the "thieves" were apprehended in the act in a subsequent theft from the Steel Company and

it related that on the occasions of the takings in January and February, the metals were delivered to the defendants. The items to be searched for included in the warrant were:

"a. Precious nickel cathoes in pallet form stamped with the initials INCO.

b. Copper inserts, square with rounded corner, ranging in weight from 2,500 to 4,000 lbs.

c. Braided cable chain with bull ring and L hooks for lifting inserts.

d. Heavy link chain with oval bull ring.

e. Gray Tarpaulin canvas, approximately 6' x 12', rope pulls at both ends.

f. Hanna Nickel described as small ingot form rectangular in shape, approximately four to five inches thick, five to six inches wide, thirty inches long, with weight of approximately fifty pounds each."

At issue is the suppression of a receipt-slip bearing the name "Parks" found on the premises and which was not one of the items described in the search warrant. The affidavit accompanying the search warrant stated factually that two employees of the Steel Company caught in the act of larceny on July 14, 1974, admitted in early August to taking metals and the apparatus for handling of those metals, which would include the braided cable chain with bull ring (c), the heavy link chain (d), and the gray tarpaulin (e), three of the named six items. The other items, (a), (b), and (f), were the stolen metals taken in January and February. The act of larceny in July put the Steel Company on notice that the earlier larcenies had been committed and it was at that point that the investigation

began, resulting in the September 2, 1974 search warrant and search. The warrant was issued about thirty days after the police secured the information from the "two thieves" that these metals and other items were sold to the defendants and as a result of which, the investigation was begun and continued up to September 2, 1974.

The general rule is to the effect that the facts in an affidavit for a search warrant should provide the basis for a finding of probable cause that named items are on the premises at the time of the intended search. ". . . it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." *Sgro* v. *United States*, 287 U.S. 206, 210-11. "The recital must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State* v. *DeNegris*, 153 Conn. 5, 8-9. Three of the items included in the search warrant, the braided cable chain (c), the heavy link chain (d), and the gray tarpaulin (e), are used in the handling and moving of metals and are not ordinarily bought and sold as marketable items in the defendant's business. Since they make handling of metals easier and more efficient, there is every reason to believe that they would be kept on the premises where they could be made use of. The first knowledge of their presence on the defendant's premises was when the larcenists made their statements in early August and Sergeant Cafferty's statement that there was cause to believe that these three items were there had a reasonable basis. At the hearing on the motions to suppress, this court had no testimony from the defendants or Scofield or Edwards as to what the defendants intended to do with the items, testimony which

came out on the subsequent trial and which the Supreme Court considered in reaching its decision, and no finding was made to that effect by this court. As to the other three items, nickel cathoes (a), copper inserts (b), and Hanna nickel (f), the possibility existed that they were still on the premises, since, as in every business, their sale depended on the market price of those items and the desire of the owners to sell at the current price or to wait for a higher one. The rule is that in each case the observations stated in the affidavit must support a reasonable belief that the material in question is on the premises. *Schoeneman* vs. *United States,* 317 F.2d 173. See Annotation 100 A.L.R. 2d 525, 534. "The question of the staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." *United States* v. *Harris,* 482 F.2d 1115, 1119 (1973). The nature of the property to be seized is important. *United States* v. *Johnson,* 461 F.2d 285. *State* v. *Kasold,* 110 Ariz. 563. *State* v. *Tella,* 321 A.2d 87. Also important is the mobility of the property. *State* v. *Hoffman,* 516 P.2d 84. Here three of the items, the three used for handling metal, were of such a nature that use of them could be made on the premises and would lead to a conclusion that they would have remained there inasmuch as it would be natural to keep them where there was constant need for them. The affidavit sets forth a continuous course of criminal conduct in which the larcenists stole the materials and sold them to the defendants during the months of January and February and further establishes a larceny in July when the perpetrators were caught in the act, which, of course, prevented delivery of the materials. Such a continuous course of action lessens the importance of the time lapse. *United States* v. *Johnson,* supra. The facts stated in the affidavit of September 2,

1974, provided the basis for a belief that the three items used for handling metals, (c), (d), and (e), were currently on the premises and the basis for belief of the reasonable probability that the metals were also there.

The remaining issue requiring the decision of the court is on the question of the voluntariness of the consent to search for the receipt-slip. "Not every search made without a warrant is unlawful. A search which is made with the full consent of the defendant may be lawful provided the state affirmatively establishes that the consent is voluntary." *State* v. *Memoli,* 159 Conn. 433, 436. *State* v. *Miller,* 152 Conn. 343, 347. "'. . . The question is one of fact to be decided by the court upon the evidence and such reasonable inferences as can be drawn from it. State v. Hanna, 150 Conn. 457, 471, 191 A.2d 124. All of the surrounding circumstances are pertinent to the question of voluntariness. State v. Hassett, 155 Conn. 255, 230, 230 A.2d 553.' See also Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854." *State* v. *Carbone,* supra, 8. Where a search is conducted without a warrant the burden is on those seeking exemption from the requirements of a warrant to demonstrate justification for it. *United States* v. *Jeffers,* 342 U.S. 48, 51. Consent to a search, regarded as a waiver of constitutional protection, must be voluntary and affirmatively established by the State. *State* v. *Miller,* supra, 347. See *Johnson* v. *Zerbst,* 304 U.S. 458, 464; *United States* v. *Wade,* 388 U.S. 218; *United States ex rel. Holloway* v. *Reincke,* 229 F.Supp. 132, 137. Where consent is established, the product of the search is admissible in evidence and the burden of establishing the voluntariness of that consent is on the State, *Pekar* v. *United States,* 315 F.2d 319; *United States* v. *Smith,* 308 F.2d 657; *State* v. *Hanna,* supra. See *State* v. *Collins,* 150 Conn. 488; *United*

States v. *Thompson*, 356 F.2d 216. "[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth* v. *Bustamonte*, supra, 228. When the officer arrived on the Carbone premises, Sergeant Targowski displayed the warrant to the defendant Peter Carbone, advised him of his purpose for being on the premises, and allowed him to read the warrant. The items described in the warrant were never found; however, some time after the searchers arrived one of them, Constantino, a special insurance investigator, asked Sergeant Cafferty if he could look at the sales receipts, paper slips, or sales slips of the company. He was told by Cafferty that he could do so only if he obtained the voluntary permission of the defendants, Carbones. With Cafferty present, Constantino asked Frank Carbone, a son of the defendant James Carbone, who was also present, and an employee of the company, if he could look at the sales receipts and slips. In reply to that request, Frank asked the defendant James, who replied, "Well I see no reason why he shouldn't see them. Fine let him have them." Frank told Constantino that he could see them and the defendant James asked Frank, "Where do we keep them?" Frank produced the slips; Cafferty left the office area; and Constantino, helped by Popowski, an employee of the Steel Company, went through the slips and found one with the name "Parks" on it. That slip was turned over to Cafferty who asked Frank, in the presence of the defendant James, if he could have the slip or a copy of it. Frank agreed, without objection from the defendant James, and Targowski accompanied by the

defendant Peter, went upstairs and prepared two photostatic copies of the receipt. Cafferty gave a receipt for the slip, which was signed by Frank and the defendant James, and took with him the original and one photostat. The members of the search party knew that receipts, slips, and papers were not included in the search warrant and that consent was needed to search for them. The conversation between the Carbones and Constantino indicates that permission was sought and voluntarily given. The defendant James, the sole proprietor of the company, by his expression that there was no reason to keep the slips from Constantino, indicated his willingness and again indicated his willingness by asking where they were kept so that their production would be aided. To go further, when Cafferty asked for the slip or photostats of it, he indicated his voluntariness through sitting in the presence of Frank, who agreed, and by allowing the defendant Peter to assist in the making of the photostats and by signing the Cafferty receipt. By his expressions and his actions, he indicated the voluntariness of his consent, as did his son Frank and defendant-brother Peter, his employees.

It is clear from a reading of *Schneckloth* that knowledge of the right to refuse to allow the search is not determinative of the voluntariness of the consent but is one factor to be considered with all the circumstances or that it is involuntary unless it could have been given in the absence of official inquiry (search warrant). In considering some of the relative factors set forth in that case, all the Carbones were adults, who were operating a business, who had been advised of their constitutional rights by the officers, and who gave their consent within a short period of time after the subject of the slips was first raised. See *United States ex rel. Combs* v. *LaVallee*, 417 F.2d 523 (2d Cir.); *United*

States v. *DeMarco*, 488 F.2d 828, 830 (2d Cir.); *United States* v. *Alloway*, 397 F.2d 105, 108 (6th Cir.); *Hoover* v. *Beto*, 467 F.2d 516 (5th Cir.). *Bumper* v. *North Carolina*, 391 U.S. 543, upon which the defendants rely, is distinguishable on the facts. In that case the person giving the permission was an elderly widow; here each defendant and the son Frank were adult businessmen. Of importance is the rule that employees, such as Frank and the defendant Peter, who possess common authority over premises or effects, may give consent for a person who shares the same authority. *United States* v. *Matlock*, 415 U.S. 164, 170. "Consent to a search is effective when given by one whose right to occupancy or possession is at least equal to that of the person contesting the search." *United States* v. *Gargiso*, 456 F.2d 584, 586. *United States* v. *Grigsby*, 367 F.Supp. 900, 902; *Frazier* v. *Cupp*, 394 U.S. 731. The actions of Frank and Peter, relatives and employees, bound the defendant James and the actions of the defendant James bound the defendant Peter. Under all the circumstances, the consent for the search for the slip was not expressly or impliedly compelled or coerced by the search warrant, the search, or the search party's presence on the premises; consent was freely and voluntarily given.

The motions to suppress and for the return of the slip should be denied.

Irving Levine, J.

APPENDIX H

Opinion and Judgment of the Supreme Court of Connecticut, Affirming the Judgment of the Superior Court

SUPREME COURT

OCTOBER TERM, 1976

Substitution Opinion*

STATE OF CONNECTICUT *v.* PETER CARBONE

STATE OF CONNECTICUT *v.* JAMES CARBONE

House, C. J., Loiselle, Bogdanski, Longo and MacDonald, Js.

Argued October 19, 1976—decision released January 18, 1977

Separate informations charging each defendant with four counts of the crime of larceny, brought to the Superior Court in Fairfield County, motions to suppress denied, *Levine, J.*, and jury trial before *Saden, J.*; verdicts and judgments of guilty on all counts and appeal by the defendants to the Supreme Court, which set aside the judgments and remanded the cases for further proceedings in accordance with its opinion; on remand, the Superior Court, *Levine, J.*, denied the motions to suppress; *Tierney, J.*, upon motion by the state, ordered the judgment in each case reinstated, from which decision the defendants again appealed to the Supreme Court, which granted a joint motion of the parties for reargument. *No error.*

* The opinion appearing in today's *Law Journal* is a substitute for the opinion in *State* v. *Carbone* which appeared in the *Law Journal* of March 11, 1975.

Ira B. Grudberg, with whom was *Mari-Jo Scopac,* for the appellant (defendant Peter Carbone).

Raymond W. Beckwith, for the appellant (defendant James Carbone).

Joseph T. Gormley, Jr., chief state's attorney, with whom was *Robert E. Beach, Jr.,* assistant state's attorney, for the appellee (state).

LOISELLE, J. Prior appeals in these cases were decided by this court in the November term of 1974.[1] The opinion does not appear in the Connecticut Reports. So that our recital of various facts from the finding shall not be interpreted as being, in any respect, different from those facts considered in the prior decision, the entire discussion relative to the finding of facts in the prior decision is included in the footnote.[2]

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[1] 36 Conn. L.J., No. 37, p. 5.

[2] The finding with respect to the motions discloses the following facts: In July of 1971, Detective Robert J. Cafferty of the Bridgeport police department became involved in an investigation of thefts of precious metals from the Carpenter Technology Corporation, hereinafter Carpenter, in Bridgeport. On September 2, 1971, Cafferty and Robert J. Magee, an employee of Carpenter, applied for and obtained a search and seizure warrant for the premises of Fairfield Scrap. The warrant commanded a search for a variety of named precious metals, and other items employed in the theft of those metals. Prior to making application for the warrant, Cafferty had been informed by Albert Edwards and Russell Scofield, the men admittedly directly responsible for the thefts, that the name "John Parks" had been used on one of the receipt slips signed at Fairfield Scrap where they claimed to have delivered the stolen items. Through an oversight, Cafferty failed to seek the inclusion of the "John Parks" receipt or, indeed, of any slips or receipts involving Scofield, Edwards or "John Parks" in the list of items authorized to be seized.

The warrant was executed on September 2, 1971. With Cafferty and Magee at the time of the execution of the warrant were . . . Popowski, an employee of Carpenter, who was present in order to identify items that might be found belonging to Carpenter, and Alfred Constantino, a special investigator for Federal Insurance

Many of the details recited in that opinion will not be repeated here. Briefly, the defendants, James Carbone and

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Company of New York, who was aiding and assisting Detective Cafferty in the investigation and was present during the search in connection with Carpenter's claim with regard to the loss of the metal. Patrolman John Sleeper, a photo technician of the Bridgeport police department, Detective Stephen Zadrovitz and Sergeant Edward Targowski of the Fairfield police department, and Special Agent Edward Buffum of the F.B.I. also assisted Cafferty in the search. None of the law enforcement officers was in uniform.

Magee, Popowski, Constantino and Patrolman Sleeper accompanied Detective Cafferty, in his police car, to Fairfield Scrap, and there was a general conversation en route about whether they might find anything with Edwards' name or Scofield's name on the Fairfield Scrap premises. Cafferty told the others not to search for anything, but that if they happened to see anything with those names on it, to let him know. He also mentioned that there might be paper work or slips. There also was a discussion concerning "John Parks," or slips possibly bearing that name. Cafferty instructed the others that they were not allowed to search for slips with the name "John Parks" because such items were not named in the warrant. He told them that if they ran into the names Scofield, Edwards or "John Parks" it could be meaningful, and he admonished them to "keep their eyes open" for those names and to tell him if they saw those names at all. Popowski understood Cafferty's advice to mean that if he saw the names Scofield, Edwards or "John Parks" on a piece of paper, he should say something, but that it was not intended that he actually go and look for them. No indication was given to Popowski that the name "John Parks" might be found on a receipt of Fairfield Scrap.

Fairfield Scrap is a sole proprietorship owned by James Carbone, and Peter and Frank Carbone are the sons of James and employees of Fairfield Scrap. The Carbones are hereafter individually referred to as James, Peter and Frank and collectively as the Carbones. Upon arrival at Fairfield Scrap, Sergeant Targowski sought out Peter and informed him that they were present with a search warrant, and read to him from the warrant the items for which they were searching. Peter threw up his hands and said: "Go ahead and look." He and Targowski then accompanied Cafferty inside the main building where Cafferty began looking through closets for items named in the warrant. James arrived a few minutes later. Targowski had the warrant in his hand at this time and showed it to James but he could not be sure if he read any portions of it to James. James asked Targowski some questions, but Targowski referred him to Cafferty, since Cafferty was familiar with the warrant. James never took the warrant and read it. Targowski then returned the warrant to Cafferty, who went upstairs to the rear

Peter Carbone, were convicted after a jury trial of four counts of larceny of personal property in excess of $2000 on four different dates between January 8, 1971, and Feb-

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office and gave Peter and James the *Miranda* [384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694] warnings. Cafferty advised Peter that he was present legally for a search and seizure, and Peter did not at that time ask Cafferty to read the warrant in its entirety.

Along with the police officers, the civilians who had arrived with them went around the premises assisting the officers, since they were familiar with the items being sought. The men searched the premises and the building. At various times during the search, Cafferty was accompanied by the civilians, Popowski and Magee, Patrolman Sleeper, Sergeant Targowski and Detective Zadrovitz. Nothing was found on the premises that was listed in the warrant.

At some time after Cafferty arrived, Constantino asked him whether he could look at the sales receipts, paper slips or sales slips of Fairfield Scrap. Cafferty told Constantino that he could do so only if he obtained the voluntary permission of the Carbones. In Cafferty's presence, Constantino asked Frank if he could look at the sales receipts and slips. Cafferty said nothing, although he knew that a possible result of Constantino's question would be that Constantino would look through the slips and that if he found anything with the names Scofield, Edwards or "John Parks" on it, he would show it to Cafferty. In reply to Constantino's request, Frank asked James, and James replied: "Well, I see no reason why he shouldn't see them. Fine, let him have them." Frank indicated to Constantino that he could see the business slips, and James then asked Frank: "Where do we keep them?" Frank produced the slips and Cafferty then left the area. Popowski and Constantino looked through the records although neither man had asked the Carbones whether Popowski could inspect these items. Neither man had informed the Carbones who he was or why he was present. Neither man had sought the permission of the Carbones to be on the premises. Constantino considered himself validly there under the terms of the warrant and at the invitation of the police. In viewing the slips, Constantino and Popowski were looking for the names Scofield, Edwards and "John Parks."

Popowski came across a slip signed by "John Parks" and then went outside and told one of the police officers. Cafferty was advised of the discovery and returned to the scale room. When he arrived back no police officers were present. Cafferty asked Frank in James' presence if he could have the slip or a copy of it. Frank agreed, but said that he would have to have a copy of it for the business. Cafferty took the original and one photostatic copy and left a photostatic copy with the Carbones. The slip was discovered approximately an hour or an hour-and-a-half after the search was

ruary 20, 1971. James Carbone was the owner of Fairfield Scrap Metal Company, hereinafter referred to as Fairfield Scrap, in Fairfield, and Peter, his son, was an employee. Russell Scofield and Albert Edwards, two former employees of Carpenter Technology Corporation, hereinafter referred to as Carpenter, in Bridgeport, testified that they had stolen copper and nickel from their employer on various dates, transported it in rented trucks, and sold it to the defendants at Fairfield Scrap. Scofield stated he had signed a slip under the name of "John Parks." A slip bearing that signature was admitted into evidence. There was also evidence that Fairfield Scrap had sold copper and nickel to a New York scrap dealer on two occasions near the dates of thefts from Carpenter.

Before the trial, motions to suppress the slip were denied.[3] The slip had been seized while a search was being

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begun. After the slip was discovered, Constantino did not ask the Carbones whether he could show the slip to the police. The Carbones were not asked to sign a consent to search form nor were they advised that the seizure of the slip was beyond the scope of the warrant. Cafferty never discussed the presence of the civilians with the Carbones nor did he seek their permission to have Constantino on the premises. Targowski saw Constantino and Popowski going through the slips and did not ask what they were doing, although he was aware that there was no authority under the warrant to search for or through said items.

Constantino was a New York detective for eighteen years prior to joining Federal Insurance Company of New York. Cafferty had arranged to invite Constantino so that he could aid and assist the police, if he observed or noted anything, and as another person to look around, although Constantino had no police powers. Popowski was asked by Constantino to help him look through some records. He handed Popowski a pile of slips and asked him to look through them for the names Scofield, Edwards or "John Parks." Peter was not in the room when the slip was discovered, but accompanied Targowski to make the photostatic copies upstairs.

[3] Certain corrections in the finding of the court which decided the motions to suppress were made in the statement of facts in the opinion on the former appeal of this case. The other corrections sought are immaterial or involve requests to add facts which are merely cumulative.

conducted on the premises of Fairfield Scrap by the police, acting under a warrant. It was not one of the items listed on the warrant. Alfred Constantino, an insurance investigator who accompanied the police, had inquired of Detective Robert J. Cafferty, who was in charge of the search party, whether he could search for sales slips. Constantino was told that he could not search under the warrant as the sales slips were not listed but was told that he could if he obtained consent. He thereafter asked Frank Carbone, another son of James and also an employee of Fairfield Scrap, whether he might look at sales slips. Frank relayed the request to James who replied, "Well, I see no reason why he shouldn't see them. Fine, let him have them." Frank got the slips and brought them out and placed them on a desk in the presence of James. Peter Popowski, an employee of Carpenter who also accompanied the police on this visit, joined Constantino in looking through the slips and discovered the "John Parks" slip. Frank, in the presence of James, was asked if the slip or a copy of it could be taken. Frank agreed and two photostatic copies were made. A receipt signed by Frank and James was made out.

The court ruled that the search was conducted by private citizens, and the fourth amendment thus was not applicable. This court disagreed, concluding that Popowski and Constantino were assisting the police and "thus, must come within the countenance of the fourth amendment." The lower court also concluded that James Carbone gave his voluntary consent to the search, that Peter lacked standing to object, and that consequently it did not need to consider the objections relating to the validity of the warrant. This court determined that Peter had standing, and that the lower court erred in failing to consider all the circumstances surrounding the purported consent, including any question of the validity of the warrant under which

entry to the premises was gained. The judgments were set aside and the cases remanded for further proceedings.

On remand, the court found that the warrant was valid, the consent was voluntary, and that the consent of any of the Carbones, all of whom had a right to be on the premises, was effective as to the others. The judgments were reinstated, and the defendants have again appealed.

The defendants claim that the warrant was invalid because there was no probable cause to believe that the items listed therein would be found, on that date, at Fairfield Scrap. The affidavit attached to the warrant, which was issued on September 2, 1971, stated that Scofield and Edwards, who had been apprehended in July of 1971, had delivered metals and appartus for moving metals (the items listed on the warrant) to Fairfield Scrap in January and February of that year. Noting the time lapse, this court stated in its prior opinion that "there was merit to the claim the warrant was stale."

Upon remand, the motions to suppress to which this court had addressed itself were resubmitted to *Irving Levine, J.*, who had ruled on the motions previously. It was agreed by all parties that a new record need not be made and that the facts presented in the first hearing on the motions to suppress could provide a sufficient evidentiary basis for the new conclusions. Consequently, the finding of facts included in the record is controlling.

The motions to suppress and for the return of the slip were denied by the court. As there was no supplemental record made, we look to the memorandum of decision to determine the reasoning for the conclusion reached by the court. *In re Application of Dodd,* 132 Conn. 237, 240, 43 A.2d 224. In considering the list of items enumerated in

the warrant,[4] in view of the previous opinion of this court that as a matter of law the search was not a private search, that Peter Carbone had standing to challenge the search, and that the claim of staleness of the warrant had merit, the court determined that the apparatus for handling metal (two chains and a tarpaulin) would have been useful in the defendants' business and was not ordinarily bought and sold in that business. The court concluded that the apparatus probably would have remained on the premises and the warrant was therefore not stale.

The court recognized that there must be probable cause that the items sought are on the premises when the warrant is issued. This principle was enunciated by the United States Supreme Court in a statutory, rather than a constitutional, context in *Sgro* v. *United States,* 287 U.S. 206, 210, 53 S. Ct. 138, 77 L. Ed. 260. The requirement, however, is believed to be one of constitutional proportions. See *Bastida* v. *Henderson,* 487 F.2d 860 (5th Cir.); *United States* v. *Gwinn,* 454 F.2d 29 (5th Cir.); *State* v. *DeNegris,* 153 Conn. 5, 9, 212 A.2d 894. It is also recognized that a time lapse between the observations on which the affidavit is based and the issuance of the warrant is an important consideration, but not necessarily controlling under all circumstances. *United States* v. *Steeves,* 525 F.2d 33, 38 (8th Cir.). We previously did not find that the time lapse alone was so great as to invalidate the warrant as a matter

[4] The items to be searched for included in the warrant were: "a. Precious nickel cathoes in pallet form stamped with the initials INCO. b. Copper inserts, square with rounded corner, ranging in weight from 2,500 to 4,000 lbs. c. Braided cable chain with bull ring and L hooks for lifting inserts. d. Heavy link chain with oval bull ring. e. Gray Tarpaulin canvas, approximately 6′ x 12′, rope pulls at both ends. f. Hanna Nickel described as small ingot form rectangular in shape, approximately four to five inches thick, five to six inches wide, thirty inches long, with weight of approximately fifty pounds each."

of law. The motions to suppress were remanded to be considered in the light of our opinion and the case not remanded for a new trial absent the items seized under the warrant. If items of property are innocuous in themselves or not particularly incriminating and are likely to remain on the premises, that fact is an important factor to be considered in determining the staleness of a warrant. In *United States* v. *Steeves,* supra, it was held that a warrant issued to search for items used in a robbery three months earlier was stale as to the money and the bank's money bag, but not as to a gun, a ski mask, and clothing worn by the robber. "The ski mask and the clothes were not incriminating in themselves, and apart from his prior felony record possession of the pistol was not unlawful in itself or particularly incriminating. Moreover, people who own pistols generally keep them at home or on their persons." Id., p. 38. See also *United States* v. *Rahn,* 511 F.2d 290 (10th Cir.) (warrant to search for guns issued on information eighteen months old not stale when affidavit showed the defendant had said guns would appreciate in value if kept, had been seen making personal use of one gun, and search of records of area pawnshops revealed no sales by the defendant). On the court's analysis it cannot be held that the court erred in denying the motions to suppress.

Because the warrant is found valid, it can no longer be maintained that the slip was "the indirect product of an unlawful search," and thus excluded according to *Wong Sun* v. *United States,* 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441. And because there was no "claim of lawful authority" to search for the sales slip, this case is distinguishable from *Bumper* v. *North Carolina,* 391 U.S. 543, 549, 88 S. Ct. 1788, 20 L. Ed. 2d 797, in which a woman "consented" to a general search after a policeman, without showing a warrant, announced, "I have a warrant to search

your house." Here the actual warrant was read to Peter and shown to James, and a specific separate request to search for the sales slip was made by one who had been informed that he could not search for the slip without express consent.

In determining whether the consent was voluntary, all the circumstances are to be considered. *Schneckcloth* v. *Bustamonte,* 413 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854. It is a question of fact for the court. *State* v. *Hanna,* 150 Conn. 457, 471, 191 A.2d 124. The court, having found that Constantino was not on the premises unlawfully, considered the other circumstances surrounding the consent, and as stated in its memorandum of decision: "The conversation between the Carbones and Constantino indicates that permission was sought and voluntarily given. The defendant James . . . by his expression that there was no reason to keep the slips from Constantino, indicated hs willingness and again indicated his willingness by asking where they were kept so that their production would be aided. To go further, when Cafferty asked for the slip or photostats of it, [James] indicated his voluntariness through sitting in the presence of Frank, who agreed, and by allowing the defendant Peter to assist in the making of the photostats and by signing the Cafferty receipt. . . . [A]ll the Carbones were adults, who were operating a business, who had been advised of their constitutional rights by the officers, and who gave their consent within a short period of time after the subject of the slips was first raised."

The determination by the trial court that consent was voluntary was reasonable considering all the evidence together with the reasonable inferences which could be drawn from it. There is no error in the denial on remand of the motions to suppress.

The defendants also claim error in the court's reinstatement of the judgments without a new trial. The Practice Book contains no mention of a motion to reinstate judgment. A new trial would have been needed, however, only had the motions to suppress been granted on remand. Reinstatement of the judgments after the motions were denied was not error. *McIsaac* v. *Hale,* 105 Conn. 249, 250, 135 A. 37, states that a finding of error with a remand to proceed according to law destroys the first judgment and requires a new trial of all the issues. In this case, however, there were two separate proceedings: the motions to suppress, heard by the court, and the trial by jury. The previous opinion concerned itself entirely with the court's denial of the motions to suppress and the remand to proceed in accordance with the opinion necessarily was limited to the motions to suppress as no other matters were discussed. Where the error occurred only in the first proceeding, and it was cured in a manner which did not change the evidence admissible in the second, a new trial was not required. See *Jackson* v. *Denno,* 378 U.S. 368, 394, 84 S. Ct. 1774, 12 L. Ed. 2d 908.

The defendants were entitled under the remand to a determination of motions to suppress and if the motions were granted, necessarily to a new trial without the admissions of those items of evidence suppressed. If, as happened in this case, the motions to suppress were denied, the most that the defendants were entitled to under the terms of the remand was this determination and no further action by the court other than entering judgment. "The reversal of a judgment annuls it, but does not necessarily set aside the foundation on which it rests. This foundation may be sufficient to support a judgment of a different kind, and may be such as to require it. A re-

versal therefore is never, standing alone, and ex vi termini, the grant of a new trial. If the error was one in drawing a wrong legal conclusion from facts properly found and appearing on the record, it would be an unnecessary prolongation of litigation to enter again on the work of ascertaining them." *Coughlin* v. *McElroy,* 72 Conn. 444, 446, 44 A. 743. See the cases of *Fitch* v. *State,* 138 Conn. 534, 86 A.2d 718, and *Fitch* v. *State,* 139 Conn. 456, 95 A.2d 255, wherein the court rendered judgment on the second case after remand to correct a referee's report with no right in the appellant to have the issues tried again. See also *Lamenza* v. *Shelton,* 96 Conn. 403, 413, 114 A. 96; *Nowsky* v. *Siedlecki,* 83 Conn. 109, 118, 75 A. 135. The defendants claim that as the previous judgment was set aside, they had a right to a new trial with the presentation of evidence as if no prior trial had occurred. As stated in *Coughlin* v. *McElroy,* supra, 447, "[a] case cannot be presented by halves. In every trial which may result in an appeal to this court, it is the duty of each party, so far as he is able, to see that whatever is material to support his contentions is proved and found. If he contents himself with bringing forward only so much as he may deem sufficient to meet those of his adversary, he must be prepared, should an appeal be taken on either side, to have it decided with reference to no other facts than those apparent on the record." In this instance, the only matter remanded, in effect, was the propriety of the admission of an item obtained during a search. As that matter has been resolved in favor of the state, there is no need for a new trial on the issues already tried to completion.

In the court's prior opinion, it is true that it was stated that "our ruling with regard to the motions to suppress

obviates the necessity of discussing the issues with regard to the trial." Had the trial court on remand granted the motions to suppress, a new trial would have been required, and claims of error in the first trial would have been mooted. Because a new trial did not occur, this court must now consider the defendants' claims of error at the trial.

The defendants claim that the prosecutions were abated, prior to the bringing of the informations, by the repeal of § 53-63a of the General Statutes, under which they were prosecuted. The repeal took place as part of a revision of the entire criminal code of this state. 1969 Public Acts, No. 828, § 214, effective October 1, 1971. Section 54-194 of the General Statutes, however, provides: "The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect." The defendants claim that § 54-194 itself was implicitly repealed by the later enactment of § 1-1 (t), which states: "The repeal of an act shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or prosecution, or proceeding pending at the time of the repeal, for an offense committed, or for the recovery of a penalty or forfeiture incurred under the act repealed."

Section 1-1 (t) is a blanket provision drawn to cover both criminal and civil statutes. It has been described as "broader" than § 54-194. *Simborski* v. *Wheeler,* 121 Conn. 195, 200, 183 A. 688. A mere overlap between the two statutes does not constitute an implied repeal of the earlier. Section 1-1 (t) preserves punishments incurred and prosecutions pending, but it does not state that liability to prose-

cution shall not be preserved under some other statute. Since the defendant was liable to prosecution at the date of the repeal, § 54-194 preserves that liability. "Repeals by implication are not favored and will never be presumed where the old and new statute may well stand together. *Fair Haven & W.R. Co.* v. *New Haven,* 75 Conn. 442, 447, 53 A. 960; *Bissell* v. *Dickerson,* 64 Conn. 61, 29 A. 226; *Windham County Savings Bank* v. *Himes,* 55 Conn. 433, 12 A. 517. . . . Furthermore . . . '[i]f courts can by any fair interpretation find a reasonable field of operation for both statutes without destroying or perverting their evident meaning and intent, it is the duty of the courts to do so, thus reconciling them and according to them concurrent effect. *Lecte* v. *Griswold Post,* 114 Conn. 400, 405, 158 A. 919; *Costa* v. *Reed,* 113 Conn. 377, 385, 155 A. 417, and cases cited; 1 Sutherland, Statutory Construction (3d Ed). § 2014.' *Shanley* v. *Jankura,* 144 Conn. 694, 702, 137 A.2d 536." *Waterbury Teachers Assn.* v. *Furlong,* 162 Conn. 390, 404, 294 A.2d 546; *Daley* v. *Liquor Control Commission,* 166 Conn. 97, 101, 347 A.2d 69; 73 Am. Jur. 2d, Statutes, § 393. There was no error in the court's denial of the pleas in abatement.

James Carbone assigns error in the trial court's refusal to find eight paragraphs of the draft finding which he submitted according to former § 629 of the Practice Book.[5] These paragraphs all involve matters which came out on cross-examination of state witnesses by the defense. The defendant's request that the court include them as evidence offered by and claimed to have been proven by the state was not appropriate. "A party to an action may not force into the claims of proof of his adversary factual

[5] Repealed October 1, 1974.

matters on which the latter does not rely." *Darling* v. *Burrone Bros., Inc.,* 162 Conn. 187, 190, 292 A.2d 912; *Franks* v. *Lockwood,* 146 Conn. 273, 276, 150 A.2d 215. The court properly denied the request.

The informations charged each defendant with four separate counts of larceny in excess of $2000, in violation of then § 53-63a of the General Statutes.[6] In his motion for a bill of particulars, James Carbone asked "whether the state claims the defendant is a principal thief or receiver of stolen goods." The state objected to this portion of the motion, and the court denied the defendant's request to force the state to specify. This was error. Under the former statutory scheme, § 53-65 of the General Statutes[7] authorized prosecution and punishment of a receiver as a principal offender under § 53-63. One charged under the larceny statute could be convicted by proof either that he was a principal or that he was a receiver. *State* v. *Palkimas,* 153 Conn. 555, 562, 219 A.2d 220. The essential elements of larceny and of receiving stolen property differ. *State* v. *Huot,* 170 Conn. 463, 467, —— A.2d ——. The information cited the larceny statute and alleged specific conduct of the defendant. It did not allege specifically any of the elements of the crime either of receiving stolen property or of larceny, except insofar as those elements might be understood as comprehended in the reference to the statute. Indeed, since it referred only to § 53-63a, and made no mention of § 53-65, the information would not have apprised a layman of the possibility of a conviction for receiving stolen property.[8] "In all criminal prosecu-

[6] Repealed October 1, 1971.

[7] Repealed October 1, 1971.

[8] This defect is cured in the present larceny statute, § 53a-119, which specifically includes receiving stolen property as a type of larceny.

tions, the accused shall have a right . . . to be informed of the nature and cause of the accusation." Conn. const., art. I, § 8; United States constitution, amend. VI. "Short form" informations were permitted by then Practice Book § 493* and held constitutional because the defendant had the opportunity to obtain the information to which he was constitutionally entitled by requesting a bill of particulars. *State* v. *Davis,* 141 Conn. 319, 321, 106 A.2d 159. Here the defendant made use of that opportunity so there was no waiver of the right such as was found in *State* v. *Coleman,* 167 Conn. 260, 268, 355 A.2d 11. The error, however, does not require a new trial because it is clear beyond a reasonable doubt that it was not prejudicial to the defendant. *Chapman* v. *California,* 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705. Obviously, the experienced counsel for James Carbone was aware that § 53-63a was violated either by larceny or by receipt of stolen property; otherwise he would not have asked the prosecution to elect between the two theories. He undoubtedly understood the state's refusal to elect as an implicit statement that it was charging both and would endeavor to prove either. See *State* v. *Palkimas,* 153 Conn. 555, 562, 219 A.2d 220; *State* v. *Ward,* 49 Conn. 429, 439. He had notice of this and an opportunity to prepare his case accordingly.

A pretrial motion for severance of the cases was denied by the court. James alleged that he would be prejudiced by the inability of the jury to separate evidence against him from evidence against Peter, and that the evidence against Peter would involve statements inculpating James but not subject to cross-examination by him. It does not appear that James and Peter had antagonistic defenses,

* Repealed October 1, 1976.

or that a joint trial was likely to result in any injustice. Compare *State* v. *Holup,* 166 Conn. 471, 352 A.2d 275. This is not a case analogous to *Bruton* v. *United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, where a confession by one defendant, properly admissible against him, also implicated another. At the time of the motion counsel did not point to any statements admissible against Peter which might also implicate James, and it is significant, although the likelihood of prejudice must be determined on the facts as known before the trial rather than after, that even now, with the benefit of hindsight, he identifies no such statements in his brief.

The defendant James Carbone also makes certain claims of error in the court's failure to give requested charges. The court charged the jury, both as to the testimony of accomplices and as to good reputation evidence, substantially as requested. The defendant's brief presents no argument to support these claims of error; therefore, they are not considered. *Nowsky* v. *Siedlecki,* 83 Conn. 109, 119, 75 A. 135; see *Stoner* v. *Stoner,* 163 Conn. 345, 307 A.2d 146. Nor do we consider claims by James Carbone based on exceptions to the charge taken by counsel for Peter Carbone. Practice Book § 249. As already implicitly stated in this opinion, it was not error for the court to charge the jury that the defendant could be convicted either as a principal thief or as a receiver of stolen goods.

The Court permitted Scofield to testify, overruling the objection that the testimony of one alleged accomplice could not be used to corroborate the testimony of another. There is no such rule in this state.

The court properly admitted the testimony of a handwriting expert to authenticate the signature on the "John Parks" slip. The defendant cites no authority for the proposition that authentication should not be allowed prior

to a claim that the signature is not authentic, nor are we aware of any.

The court admitted the records of Sola Metal, a New York scrap dealer, showing a purchase from Fairfield Scrap of four pieces of copper on January 25, 1971. The pieces weighed 2340, 4240, 2348 and 2420 pounds, with a deduction for 667 pounds of dirt. The indictment charged the defendants with larceny of copper, specifically, five pieces weighing a total of 10,000 pounds, on or about January 24, 1971. The defendant objected that this evidence was speculative and insufficiently tied to other evidence in the case. He pointed to testimony by Edwards and Scofield that there was no way that more than 600 pounds of dirt could have been put on the copper, and to certain other testimony apparently viewed by him as inconsistent, but not presented in the finding or the brief in such a manner that any inconsistency appears. The dirt is not such an inconsistency as to make the evidence speculative or irrelevant; there was no error in admitting the records.

At the trial, the court refused to permit counsel for Peter Carbone to cross-examine Scofield and Edwards regarding their prior invocation of their fifth amendment privilege when being deposed in a civil action which Carpenter brought against them and the Carbones. It is Peter's contention that this would have shown the bad faith of Scofield and Edwards, who were entitled to claim the privilege, but did so after deciding to cooperate with the police. Peter's theory was that they claimed the privilege only in order to prevent the Carbones from learning their testimony in advance. This amounts to mere speculation. The prior invocation of a constitutional privilege can be motivated by so many factors other than bias that the court was within its discretion in excluding cross-examination on this matter as irrelevant. *Raffel* v. *United States,*

271 U.S. 494, 499, 46 S. Ct. 566, 70 L. Ed. 1054, relied upon by the defendants, is not to the contrary; it held only that when a defendant waived the privilege and testified at his second trial that he did not make a statement reported by a witness, he might be cross-examined concerning his silence at the first trial, which was inconsistent with such a denial. In *Grunewald* v. *United States,* 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931, *Raffel* was distinguished, and the Supreme Court stated that unless constitutional questions are raised by the danger that a jury may equate use of the fifth amendment with guilt, the decision of whether to permit inquiry regarding prior use of that plea to impeach present testimony is one for the discretion of the trial judge, who should satisfy himself that the prior use of the plea is indeed inconsistent with the present testimony. On the facts in this case, the trial court was within its discretion in barring such cross-examination.

The trial court also excluded certain evidence that Scofield and Edwards rented similar heavy trucks for use on five dates between May 12 and early July, 1971, and that the trucks were used for short mileages, from which an inference might be drawn that deliveries were made only in the Bridgeport area. Edwards admitted that he continued stealing, but maintained he made his deliveries outside Bridgeport after February 20, 1971, the date of the last transaction with which the Carbones were charged. Scofield also claimed that the last sale to the Carbones was February 20, and that later sales were made in South Norwalk. He denied making any deliveries in Bridgeport in June and July. The state objected to the evidence as immaterial, irrelevant, speculative, far removed from the time in question in the case and not inconsistent wth other statements of the wtnesses. The court has wide discretion

as to questions of relevancy and remoteness. *State* v. *Mahmood*, 158 Conn. 536, 540, 265 A.2d 83. Evidence which is inconsequential and tends to distract attention from the real issue should be excluded. *State* v. *Bassett*, 151 Conn. 547, 551, 200 A.2d 473. Since the Carbones were not charged with any crimes after February 20, the truck rental evidence was not related to a matter in issue. It was admissible, if at all, only to impeach the testimony of Scofield and Edwards. Impeaching a witness on a collateral matter by extrinsic evidence is not allowed. *Hirsch* v. *Vegiard*, 137 Conn. 302, 304, 77 A.2d 85; *Johnson* v. *Palomba Co.*, 114 Conn. 108, 115, 157 A. 902.

Peter also claims the court erred in sustaining objections to cross-examination designed to elicit testimony that Carpenter, in connection with its civil suit against Scofield and Edwards, had failed to attach Edwards' house or car or Scofield's real estate. It was the defendant's claim that Carpenter's inaction in this respect showed the witnesses had an interest in helping Carpenter recover its losses from the Carbones. The record reveals that Edwards' house had been placed in his wife's name in 1970, and that his car, purchased in mid-1971, had been repossessed for falure to keep up the payments. Scofield's real estate had been conveyed to his wife in May or June of 1971 in connection with a divorce decree and written agreement. It does not appear that Carpenter could have attached anything except the car, to which the financing lender would have had priority. The court properly sustained the objection.

After duly weighing the claims of the defendants as to the remanded motions to suppress and as to the trial, we find no error in either case.

There is no error.

In this opinion the other judges concurred.

APPENDIX I

Motion for Reargument

SUPREME COURT

STATE OF CONNECTICUT

JANUARY 27, 1977

No. 20736

STATE OF CONNECTICUT

v.

JAMES B. CARBONE

Defendant James Carbone respectfully moves the Supreme Court for reargument pursuant to Rules of Practice, Sec. 703, as amended, and shows in support thereof the following.

I.

The Supreme Court in its substitution opinion held that the defendant James Carbone's motion for a bill of particulars was improperly denied and that the action of the Superior Court, Levine, J., in denying such request that the State specify whether the claim against the defendant James Carbone was a principal thief or a receiver of stolen goods was error. A similar issue results from the denial of defendant James Carbone's motion to elect.

Although the Supreme Court recognized that it was error for the Court to deny the request of defendant James Car-

bone, it held that this error did not require a new trial "because it is clear beyond a reasonable doubt that it was not prejudicial to the defendant." The Court held that the error was harmless because defendant was aware that the State "would endeavor to prove either" that defendant was a principal thief or a receiver. However, the invocation of such a rationale in support of the harmless error doctrine runs afoul of defendant's right, as guaranteed by the Sixth Amendment to the Constitution of the United States and Article I, Sec. 8 of the Connecticut Constitution, to be "informed of the nature and cause of the accusation."

The Supreme Court went on to state that defendant's then counsel obviously would not have asked for a bill of particulars or for an election if he had not understood that the state's attorney would be implicitly stating that he was charging both elements of both crimes and would endeavor to prove both. The Supreme Court concluded that the defendant James Carbone had notice of such charges and would thus have an opportunity to prepare accordingly, in effect preparing both cases.

While it may be permissible for the State to seek a conviction, under a single count, of one or the other of crimes that are not mutually exclusive—such as a greater or a lesser included offense—that is not the situation that obtains here, since "[i]t is the settled rule that one cannot be both a principal thief and a receiver of the same goods." *State* v. *Palkimas,* 153 Conn. 555, 561 (1966). In a case such as this, where the alternative offenses are mutually exclusive, "[t]o recite that the defendant did the one thing or another makes the [information] bad for uncertainty." *Ackley* v. *United States*, 200 F. 217, 221 (8 Cir. 1912). As the United States Supreme Court observed long ago:

> "[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or another of several offenses, would be destitute of the necessary certainty, and would be wholly insufficient." *The Confiscation Cases,* 20 Wall. [87 U.S.] 92, 104 (1873).

Thus, in *United States* v. *Dedof,* 42 F. Supp. 57 (E.D. Pa. 1941), an indictment charging defendants with threatening to deprive certain persons of congressionally-appropriated compensation or benefits on account of those persons' "support of or opposition to a political party" was held void for uncertainty in that it pleaded offenses in the disjunctive. In *United States* v. *Donovan,* 339 F.2d 404 (7 Cir. 1964), *cert. denied,* 380 U.S. 975 (1965), an indictment charging violations of 29 U.S.C. Sec. 186—a section of the Labor Management Relations Act which prohibited, in the disjunctive, several distinct courses of conduct—without specifying which particular course of conduct the defendant had engaged in was held unconstitutionally indefinite. And in *People* v. *Johnson* 16 Ill. App. 3d 819, 307 N.E. 2d 159 (1974), the complaint alleged that the defendant was "driving under the influence of liquor or drugs"; the court held that, since driving under the influence of liquor and driving under the influence of drugs are separate offenses with different elements, "the complaint is void for failure to set forth the nature and elements of the charge with certainty as required by both the federal constitution (Amendment VI) and Section 111-3(a)(3) of the [Illinois] Code of Criminal Procedure." 307 N.E. 2d at 160.

To say that the error in this case was harmless because defendant James Carbone was aware that the State might try to prove that he was *either* a thief *or* a receiver is thus to deny him his constitutionally guaranteed right to know

which of these mutually exclusive charges he was required to defend.

That the State would attempt to prove both offenses and to prove either offense is, of course, apparent after the fact, but as the Supreme Court pointed out in a discussion of another point in the substitution opinion, "the likelihood of prejudice must be determined on the facts as known before the trial rather than after . . ." The defendant James Carbone respectfully submits that this is not a question of what actual happened at trial or after, but a question of what happened on the facts known before the trial.

State v. *Palkimas, supra,* cited by the Supreme Court for the proposition that the defendant could be convicted either as a principal thief or receiver under the larceny statute does not deal directly with the point. It is difficult, however, to argue that because the defendant knew that the two crimes would not be separated that therefore he had the opportunity to prepare his case, or in effect both cases. That is, the defendant may well have proceeded differently had the motion been granted.

II.

With respect to the issues surrounding the warrant, the search and the motions to suppress, the Supreme Court has now held that the Superior Court, Levine, J., did not err in denying the motions to suppress of both defendants. In its original opinion the Supreme Court held that there "clearly was merit to the claim that the warrant was stale," and further that the Court, Levine, J., erred in failing to consider staleness. Upon a close reading of this language, it may be inferred that the warrant was stale and that it affected the ruling on the issue of consent.

At the second hearing before the Court, Levine, J., and particularly in his memorandum of decision, the Judge made reference to this issue, and the Supreme Court has now said in the substitution opinion that he properly held that the "apparatus probably would have remained on the premises."

There appears to be no particular basis in fact for this conclusion. That is, there is nothing in the evidence indicating that the defendant James Carbone would have kept the chains and tarpaulin on his premises even though he had disposed of the metal. It would seem that a fairer inference is that the chains and tarpaulin would have been destroyed so as to remove any items of incriminating evidence from the premises. It can hardly be said that the search party really expected to find handling equipment many months after the fact. The Supreme Court further stated on this issue that if the items of property are "innocuous in themselves" a period of staleness may not commence to run for a considerable period of time. This would seem to permit extensive search at a much later date if in fact the search warrant deliberately specified an item of innocuous property.

III.

The defendant James Carbone respectfully submits that his motion for reargument be granted.

DEFENDANT, JAMES B. CARBONE

By /s/ RAYMOND W. BECKWITH
Raymond W. Beckwith
955 Main Street
Bridgeport, CT 06604

APPENDIX J

Denial of Motion to Reargue by Supreme Court of Connecticut

"February 3, 1977. The defendant's Motion to reargue s denied. By the Court, House, Chief Justice."

APPENDIX K

Constitutional and Statutory Provisions Involved

U.S., Const., Amend. 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., Amend. 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., Amend. 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

U.S. Const., Amend. 14:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Conn. Gen. Stat. §53-63(a):

(a) Any person who steals any money, goods or chattels, or any bill issued by any state bank or national banking association, or any deed, lease, indenture, bond, writing obligatory, bill of exchange, promissory note, warrant or order for the payment of money or delivery of goods, receipt or discharge, or any book account or other writing being evidence of debt, adjustment or settlement, if the value of the property stolen exceeds two thousand dollars, shall be imprisoned not more than twenty years or fined not more than one thousand dollars or both; if it exceeds two hundred fifty dollars but does not exceed two thousand dollars, he shall be imprisoned not more than five years or fined not more than five hundred dollars or both; if it does not exceed two hundred fifty dollars but exceeds fifteen dollars, he shall be fined not more than two hundred dollars or imprisoned not more than six months or both; if it does not exceed fifteen dollars, he shall be fined not more than twenty-five dollars or imprisoned not more than thirty days or both.

Conn. Gen. Stat. §53-65:

Any person who receives and conceals any stolen goods or articles, knowing them to be stolen, shall be prosecuted and punished as a principal, although the person who committed the theft is not convicted thereof.